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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165, 74-166

ROBERT W. BLANCHETTE, *et al.*, TRUSTEES,
Appellants,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

RICHARD JOYCE SMITH, TRUSTEE,
Cross-Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees.

On Cross-Appeals from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEE AND CROSS-APPELLEE UNITED STATES RAILWAY ASSOCIATION

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BRIEF OF APPELLEE AND CROSS-APPELLEE UNITED STATES RAILWAY ASSOCIATION

Richard Joyce Smith, Trustee of the property of the New Haven railroad ("New Haven Trustee"), has cross-

appealed (No. 74-166) from that portion of the decision of a three-judge United States District Court sitting in the Eastern District of Pennsylvania which rejected in part his attack on the constitutionality of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-93 ("Rail Act" or "Act"). The New Haven Trustee appeals from the lower court's ruling that his contention that the transfer provisions of the Act will cause a "permanent taking" of his property was not ripe for adjudication. In this Brief, Cross-Appellee United States Railway Association ("USRA" or "Association") responds to the New Haven Trustee's arguments in that regard.

USRA itself has appealed from that portion of the lower court's decision which held unconstitutional certain sections of the Rail Act because of the possibility that they might cause an "erosion taking" of the property of the New Haven Trustee and other Plaintiffs. We set forth our reasons for believing that the lower court's ruling in that regard should be reversed in our Brief as Appellant in No. 74-167.

The Trustees of the property of Penn Central Transportation Company ("Penn Central Trustees") also have filed an appeal (No. 74-165), seeking reversal of the lower court's ruling that the Rail Act repeals *pro tanto* the Tucker Act, 28 U.S.C. § 1491. The Penn Central Trustees' position on that issue is essentially the same as the position stated in our Brief as Appellant in No. 74-167. However, the Penn Central Trustees take positions similar to those of the New Haven Trustee on other issues; where those positions require separate response, we respond to them in this Brief.

The United States also has filed an appeal (No. 74-168). Since its contentions on that appeal are similar to ours in No. 74-167, they require no response herein.

QUESTIONS PRESENTED

1. Was the court below correct in deciding that the "permanent taking" issues were not ripe for adjudication and did it err in deciding that the "erosion taking" issues were ripe for adjudication, when (a) the record presents no factual basis on which either set of issues can be decided and (b) the New Haven Trustee will have an adequate remedy if and when his claims become ripe?

2. May Congress constitutionally require the transfer of some Penn Central rail properties to Conrail for continued rail use in exchange for a "constitutional minimum" consideration that includes Conrail securities, or must Congress either (a) acquire such properties for cash in condemnation proceedings or (b) permit claimants to liquidate Penn Central immediately?

3. May Congress constitutionally require the transfer of some Penn Central rail properties to Conrail without a vote of Penn Central's creditors and before the properties are valued if it provides for subsequent valuation proceedings in a federal court to determine whether the Penn Central estate has received the "constitutional minimum" consideration?

4. Is the Rail Act void as a nonuniform law on the subject of bankruptcy, or is it (a) uniform and (b) within the powers of Congress under the Commerce Clause and Article III without regard to uniformity?

STATEMENT OF THE CASE

USRA has presented a Statement of the Case in its Brief as Appellant in No. 74-167 and will not repeat that Statement here.[1] However, certain assertions in the

[1] Brief of United States Railway Association, Appellant, in No. 74-167 ("Brief of Appellant USRA") at 5-14. We wish to add that

New Haven Trustee's Statement of the Case require specific comment.

1. The assertions about the reorganization of the New Haven railroad, the inclusion of New Haven assets in the merged Penn Central and the present status of the New Haven Trustee's claims against the Penn Central estate are neither accepted nor disputed by USRA. Any unresolved questions about the nature or validity of these claims are not material to the resolution of the issues before this Court and should not be decided on this appeal.

2. The assertion of the New Haven Trustee that certain deferred payments shown on Penn Central's books represent "a priority administration claim" against the Penn Central estate [2] is not correct. Neither the valid existence nor the priority of any such claim has been adjudicated in the Penn Central reorganization. In particular, the nature and amount of any eventual claim for unpaid leased-line rentals depend on whether Penn Central ultimately affirms the leases, which it has not yet done, and the validity and status of claims for interest accruing on various obligations during the reorganization will present even more complex questions.[3]

3. The New Haven Trustee asserts that the January 1, 1973 and February 1, 1973 Reports of the Penn Central Trustees "acknowledged that reorganization would

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since the Brief of Appellant USRA was filed, USRA has asked Congress to extend by 120 days the deadlines specified in the Rail Act for releasing the preliminary system plan and adopting the Final System Plan.

[2] Brief of Richard Joyce Smith, Trustee of the Property of the New York, New Haven and Hartford Railroad Company, Debtor, Cross-Appellant in No. 74-166 ("Brief of Cross-Appellant") at 6 n. 3.

[3] It is stipulated that the Penn Central estate's actual obligations to the leased lines and for post-bankruptcy interest cannot be determined at this time. See Stipulation ¶¶ 13, 14, Joint Appendix ("JA") 317 at 321-322.

not be possible without a *government grant* (not merely financial assistance by way of loans or guarantees of borrowings) on the order of $600 million to $800 million." [4] This description of those reports is incorrect. The Trustees' January 1, 1973 Report stated:

> "The Trustees have concluded that without government financial assistance for improvement of the railroad, a reorganization of Penn Central cannot be achieved in 1976, as they had considered possible.
>
> "The extent of assistance needed, as well as the forms of assistance which the Trustees will recommend, will be the subject of further advice to the [Reorganization] Court . . . ." [5]

Elsewhere in the same Report, the Trustees characterized their financial problem as a "vicious circle": inadequate cash for equipment expenditures was both the cause and the result of inadequate revenues.[6] As Congress later concluded, Government-guaranteed debt capital could play a significant role in breaking that vicious circle. In the Trustees' February 1, 1973 Report, they stated that the necessary government assistance could be provided "in a number of different [alternative] forms." One of the suggested alternatives was $600 million to $800 million in cash "subsidies." [7] An alternative suggestion made in the same report was that government financial assistance, in apparently the same amount, be provided on a "joint

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[4] Brief of Cross-Appellant at 7 (emphasis in original).

[5] Penn Central Trustees' Interim Report of January 1, 1973, reprinted in the Joint Documentary Submission ("J. Doc.") 8 at 1.

[6] *Id.* at 2, 4.

[7] Penn Central Trustees' Interim Report of February 1, 1973, J. Doc. 9 at 5-7. The word "grant" was not used. It is noteworthy that the Trustees themselves proposed that any such subsidy be accompanied by rail service and expenditure requirements that could have imposed a significant burden on the estate.

venture" basis contemplating ultimate "repayment of the government contribution." [8] On April 3, 1974, after the Rail Act became law, the Penn Central Trustees reported to the Penn Central Reorganization Court that "[t]he basic concept of the Act is, in the Trustees' judgment, sound," and they characterized it as "endors[ing] [in many respects, apparently including the need for financing] the Trustees' prior reports on what conditions would have to be realized as a prerequisite to a viable rail system in the Northeast." [9]

4. The New Haven Trustee quotes at length from a March 1973 opinion of Judge Fullam in the Penn Central reorganization proceeding.[10] In that opinion, Judge Fullam expressed doubt that the Penn Central "could properly be permitted to continue to operate on its present basis beyond October 1, 1973." The New Haven Trustee then asserts that the Penn Central has now continued to operate "on its present basis" for a year beyond that date.[11] This assertion does Judge Fullam a considerable injustice by overlooking his central premise. Judge Fullam recognized explicitly in his March 1973 opinion, as well as in his opinion below in this case, that the right to require continued operations during the reorganization period depends on the prospects for an ultimately successful reorganization. In March 1973, it appeared impossible to reorganize Penn Central without federal help which had not yet been provided, and it was on that "basis" that the propriety of requiring continued operations appeared doubtful. Passage of the

[8] *Id.* at 6.

[9] Penn Central Trustees' Report on Reorganization Planning (April 3, 1974), J. Doc. 10 at 4.

[10] Brief of Cross-Appellant at 8-9, quoting *In re Penn Central Transp. Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973).

[11] *Id.* at 9 n. 8.

Rail Act wholly changed the basis for continuing operations. If the Rail Act is held unconstitutional, then Penn Central may be required to shut down, but the New Haven Trustee's disregard of the Rail Act simply begs the question.

SUMMARY OF ARGUMENT

I.

This Court has repeatedly held that federal courts should decline to decide issues that are premature. Its decisions establish that both the "permanent taking" and "erosion taking" issues in this case are premature for two reasons: first, those issues could be decided only on a hypothetical basis, since the present record is inadequate to support a holding that anyone will fail to receive the "constitutional minimum" consideration which the Act requires the Final System Plan to provide; second, an adequate legal remedy will be available if and when it becomes possible to establish that the consideration under the Plan will be inadequate.

The lower court correctly ruled that the New Haven Trustee's "permanent taking" contentions were premature. Neither the record on the motions for summary judgment nor any record that could have been made at trial would have permitted the lower court to determine that the Rail Act will cause a transfer of rail properties for less than the "constitutional minimum" prescribed by Section 303 and the Fifth Amendment. There will be an adequate future opportunity for the New Haven Trustee to challenge his treatment under the Final System Plan after that Plan has been developed, when the issues can be framed and decided in a concrete context with the guidance of an adequate record. Thus, it would have been inappropriate for the lower court to decide now, on a hypothetical basis, generalized constitutional questions relating to the transfers of rail properties.

Moreover, the "erosion taking" issues were also premature. As Judge Fullam stated in his separate opinion below, the permissibility of uncompensated interim erosion can be decided only in the light of the constitutionality of the ultimate result which implementation of the Act will produce. The provisions of the lower court's order based on the possibility of an erosion taking were unnecessary and improper in view of the absence of a present basis for determining whether any interim erosion will exceed constitutional limits and the ability of the Special Court or, if necessary, the Court of Claims to provide a remedy should that occur.

The New Haven Trustee's argument that the Final System Plan may require the transfer of Penn Central assets for less than the "constitutional minimum" value was presented to the court below as a wholly abstract and hypothetical proposition. It raises complex constitutional questions relating to the definition of "value" under the Fifth Amendment. The New Haven Trustee sought to have the lower court decide those questions on a record which does not show what assets are involved, what their value is under *any* theory of valuation, or what the value of the consideration provided in the Final System Plan will be.

Similarly, for the lower court to adjudicate the "erosion taking" issues would have required it to define the constitutional limits on interim erosion against the backdrop of a record which does not show whether or to what extent any erosion injury will occur or whether the final consequences of reorganization under the Rail Act will justify any interim burden. The lower court implicitly acknowledged the inadequacy of the record by failing either to define the governing constitutional standard or to make findings which would support a conclusion that unconstitutional erosion is likely to occur. It left those matters to be decided by some other court at some other time.

There was no need for the lower court to adjudicate any of the taking allegations on a speculative basis, because any interested party will be able to bring the issues before a federal court at a later time on a better record and to obtain adequate relief if his claims prove to have merit. Section 303 of the Rail Act will require the Special Court, subject to review by this Court, to review the fairness and equity of the Final System Plan to each railroad estate. The question in that review proceeding will be whether each estate has received the "constitutional minimum" consideration for rail assets transferred, a question which encompasses the issue whether the consideration should reflect the cost of keeping the railroad operational prior to the transfers. The Special Court will have the power to take any such "erosion" burden into account and provide compensation for it if necessary. In the event that the total consideration available to the Special Court is insufficient to pay the constitutional minimum value, any injured party will have a further legal remedy in the Court of Claims under the Tucker Act. Alternatively, he may seek injunctive relief from the court below or another three-judge court after USRA adopts the Final System Plan and before the date set for the transfers; or he may seek to invoke the equitable power of the Special Court to refuse to order conveyances which would violate constitutional rights.

II.

Even if the New Haven Trustee's attack on the transfer provisions were not premature, he would not be entitled to relief on the merits of that attack. The New Haven Trustee asserts a constitutional right to be "cashed out" of his investment in Penn Central rather than to remain an investor in a reorganized entity that will continue some or all of Penn Central's rail operations. That assertion is refuted by decisions of this Court which establish that Congress has broad authority to adjust creditors'

claims in reorganization and that the Rail Act falls within the Fifth Amendment limits on that authority.

The New Haven Trustee argues that the Rail Act is an exercise of the power of eminent domain rather than of the bankruptcy power because each class of creditors of the several railroads subject to the Act will not have an opportunity to disapprove the Final System Plan. However, this Court's decisions under other bankruptcy laws establish that Congress may require reorganization without creditor approval so long as it furnishes safeguards which fully protect creditors to the extent of the value of their claims. The valuation provisions of Section 303 clearly provide such safeguards.

Seeking to strengthen his depiction of the Rail Act as a condemnation law, the New Haven Trustee contends that Conrail will be a Government instrumentality rather than a private corporation. Although the Rail Act establishes Conrail as a for-profit corporation, which will be entirely owned by the rail estates transferring properties under the Final System Plan, Plaintiff suggests that Conrail will not in fact be a private enterprise because the Act provides for temporary Federal representation on its board of directors. To the contrary, the Act's provision for majority federal representation on the board if Government obligations are more than one-half of Conrail's debt is a reasonable measure to protect federal interests in that contingency. Even if the contingency should occur, full control of Conrail's affairs will transfer to its shareholders as soon as Conrail's private borrowing exceeds or replaces its federally guaranteed debt.

This Court should not accept the New Haven Trustee's suggestion that it decide the measure of the "constitutional minimum" value which the railroad estates are entitled to receive in exchange for their rail properties. He argues that the "constitutional minimum" is at least the current net liquidation value of the properties and

may be greater because Penn Central's properties are an "irreplaceable national asset." We submit that the New Haven Trustee is wrong in his assertion that this constitutional issue is ripe for decision and wrong in his suggested resolution of the issue.

The Rail Act gives the Special Court the responsibility to decide what the "constitutional minimum" is when it determines the fairness and equity of the transfers under the Final System Plan. At that time the Special Court will have a factual record on which to decide the issue and a panoply of remedies to redress any unfairness in the exchanges. Moreover, the Tucker Act will be available to remedy any shortfall if the total value available to the Special Court proves inadequate. Therefore, there is no reason for this Court to disregard Congress' decision that the issues raised by the New Haven Trustee should be determined initially by the Special Court in the statutory review proceedings.

If this Court nevertheless concludes that it should define the "constitutional minimum" it should reject the New Haven Trustee's proposed definition. His assertion that the Penn Central estate is entitled to at least current net liquidation value rests on the premise that Penn Central has a present right to cease operations and liquidate. As noted in our Brief as Appellant, Penn Central has no such right in view of the substantial possibility of successful reorganization under the Rail Act. A franchised common carrier can be required to continue to serve the public as long as its operations are profitable or can be made profitable by reorganization. Therefore, where a railroad can be reorganized to have a substantial going-concern value, that value is the measure of the investors' rights even if net liquidation value would be higher. The rule for which the New Haven Trustee contends would imply that a carrier is constitutionally entitled to cease operations and liquidate whenever the funds it has dedi-

cated to public use could be used more profitably in another enterprise.

This Court did not embrace the New Haven Trustee's theory in *New Haven Inclusion Cases*, as he asserts. In that case, since the New Haven properties had no going-concern value, either separately or as part of Penn Central, the Court did not decide whether a substantial going-concern value would be constitutionally sufficient payment for the properties.

There is no basis for the New Haven Trustee's further suggestion that the Penn Central estate may be entitled to even more than net liquidation value because Penn Central's properties are an "irreplaceable national asset." That contention amounts to an attempt to take advantage of the public need for continued Northeastern rail operations by "holding up" the Government for an amount greater than the value of the properties in the private marketplace. The tactic is an old one, and this Court's decisions condemning it are equally old. Even in a condemnation context, it is firmly established that the measure of compensation under the Fifth Amendment is the owner's loss—measured at private market values—and not the taker's gain.

The New Haven Trustee counters this established doctrine with two state court decisions. Those decisions are authorities under New York, not the Federal Constitution, and they provide no basis for abandoning the consistent federal rule.

The New Haven Trustee invites this Court to strike down the statute Congress enacted and to advise Congress on ways to amend or replace it. However, that is not this Court's role. The Rail Act is Congress' attempt to resolve the Northeast rail problem without resorting to nationalization. The New Haven Trustee would prefer to have vital rail services continued by nationalization, a route he believes would bring him compensation wholly in cash

and possibly in a much higher amount than obtainable in reorganization. However, he has no legal right to have this Court assist him in thwarting Congress' purposes. The Rail Act, while not perfect, is the statute that Congress has enacted and the one that this Court must construe. It should be construed in a way that renders it constitutional if that is possible.

III.

The New Haven Trustee contends that the Rail Act denies him procedural due process. He attacks two aspects of the Act's procedures: first, its failure to give creditors of individual railroads a vote on whether to accept the Final System Plan; and second, its provision deferring judicial review of the consideration received for transferred properties until after the transfers have occurred.

Although these features are departures from the normal practice under Section 77, they create no constitutional infirmities. Rather, the differences between the Rail Act and Section 77 are what give the Act a chance of producing a successful reorganization of the Northeast railroads where Section 77 has proven inadequate. Section 77 deals with the recapitalization of individual railroads whose operations are inherently profitable. It provides neither a means of restructuring rail operations nor a way of coordinating the reorganization of several railroads. By contrast, the basic objective of the Rail Act is to redesign and combine the rail operations of separate entities to make them self-sustaining.

Congress determined that the Rail Act cannot accomplish its purpose if each class of creditors of each rail estate must vote on the Final System Plan. Congress also concluded that the implementation of the Plan cannot await the outcome of the lengthy valuation process. The Rail Act's procedures contain adequate safeguards to insure that all interests will be fairly treated upon comple-

tion of the valuation process. They are designed to provide fair treatment while permitting the accomplishment of the Congress' objectives. Due process requires no more than that.

IV.

The New Haven Trustee renews his contention, essentially rejected by the Court below, that the Rail Act is void as a nonuniform law on the subject of bankruptcy. That contention is wholly academic. The Rail Act operates uniformly with respect to every bankrupt railroad operating in the United States and all creditors of each. Congress was aware that all of these railroads are in fact located in the region defined by the Rail Act, and it would be a purposeless exercise, protecting the rights of no one, for this Court to rule that the Act must be written to avoid any recognition of that fact.

Moreover, the contention of the New Haven Trustee is not even technically correct. The uniformity requirement in the Bankruptcy Clause has been construed to permit Congress to take account of the real differences that exist between parts of the country. Other constitutional provisions containing similar uniformity requirements have been likewise construed.

Finally, the uniformity requirement is only a limitation on the power delegated to Congress in the Bankruptcy Clause. It does not limit Congress' powers under the Commerce Clause and Article III. As the court below held, the features of the Rail Act which the New Haven Trustee attacks can be sustained as an effort based on the Commerce Clause to provide a solution to a problem affecting commerce. The provisions transferring some existing bankruptcy powers to the Special Court are within Congress' power under Article III to define the jurisdiction of the lower courts. The Act is sustainable as a necessary and proper exercise of Congressional powers which are not limited by any requirement of geographical uniformity.

ARGUMENT

I. BOTH THE "PERMANENT TAKING" AND THE "EROSION TAKING" ISSUES ARE PREMATURE

USRA agrees with Judge Aldisert's majority opinion that the "permanent taking" issues are premature. Neither the record before the court below on the motions for summary judgment nor any record that could have been made at trial would have permitted the court to determine that the Rail Act will cause a transfer of rail properties for less than the "constitutional minimum" prescribed by Section 303. The constitutional questions relating to the future transfers of rail properties were therefore presented below on a hypothetical and speculative basis. There will be an adequate opportunity, after the Final System Plan has been developed, for interested parties to present these questions to a federal court at a time when they can be decided in a concrete context with the guidance of an adequate record.

The erosion issues were premature as well. The orders of the court below relating to Sections 303 and 304(f) were essentially circuitous standby orders predicated on a hypothetical future determination of the central issues—including the existence of any actual erosion injury—by some other court.[12]

It is clear that, even in the presence of a case or controversy sufficient to confer jurisdiction, a federal court should decline to decide issues that are premature.[13]

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[12] See Brief of Appellant USRA at 66-74.

[13] Courts should not reach constitutional questions when the existence of injury depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations," *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 (1948). Courts should avoid "passing on questions of public law even short of constitutionality that are not immediately pressing." *Id.* at 432. Courts do not adjudicate "matters of serious public concern" on a record that is not "adequate and full-bodied." *Public Affairs Press*

There is, however, no bright-line test that separates the cases where the dispute is sufficiently concrete and immediate and the record sufficiently informative to make a decision appropriate from the cases where the dispute is so hypothetical and remote that the issue should be postponed. The statement of Justice Frankfurter quoted by the New Haven Trustee suggests a pragmatic test: "Courts do not review issues, especially constitutional issues, until they have to." [14] Such a need does not exist.

There are two factors that make the "permanent" and "erosion taking" issues premature in the present case. On the present record, the possibility that anyone will receive inadequate consideration under a statute that expressly requires constitutionally adequate exchanges is

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v. *Rickover*, 369 U.S. 111, 112-13 (1962). Nor do courts rest conclusions concerning "an extremely important question . . . on an indefinite factual foundation." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256 (1948). Where the request is for declaratory or injunctive relief, an incomplete record and the premature posing of issues are particularly compelling grounds for withholding such discretionary remedies. As Justice Frankfurter wrote for the Court in *Eccles* v. *Peoples Bank*,

> "Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment." 333 U.S. at 434.

To the same effect is the Court's observation in *Kennedy* v. *Silas Mason Co.*, *supra*, that:

> "[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." 334 U.S. at 256-57 (footnote omitted).

See also *Public Affairs Press* v. *Rickover*, *supra*, 369 U.S. at 112; *A.L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 331 (1961); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237 (1952).

[14] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 154-55 (1951) (concurring opinion), quoted in Brief of Cross-Appellant at 25.

wholly speculative, and the nature and scope of any such inadequacy are unknown at this time.[15] And this is not the last time when the issues raised by that possibility can be adjudicated. If and when the existence of inadequate consideration is demonstrated by a concrete record, a federal court will be available to provide an adequate remedy. There simply is no need for an immediate resolution of the many difficult hypothetical constitutional and statutory questions posed by the New Haven Trustee, which may never actually arise. A federal court will be available to decide the questions, if any, that turn out to be real.

A. The "Taking" Allegations Are Not Ripe for Adjudication on the Present Record

1. *Allegations Relating to the Final System Plan*

The New Haven Trustee contends that the implementation of the Final System Plan will or may require a transfer of Penn Central's property for public use for less than just compensation. He alleges, in other words, that the value of the consideration provided for whatever Penn Central assets are transferred pursuant to the Final System Plan will or may be less than the "constitutional minimum" value required by Section 303 and the Fifth Amendment. Brief of Cross-Appellant at 63. That general allegation involves many complex constitutional questions relating to the definition of "value," including for example the following:

> (a) Is the constitutional value of rail properties their value for rail use or for other purposes? Does

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[15] The Penn Central Trustees argue that, since "no one can deny the possibility of unconstitutional erosion," this Court must adjudicate this controversy on the assumption that unconstitutional erosion is inevitable. Brief for Robert W. Blanchette, et al., Appellants, in No. 74-165 ("Brief of Appellants Penn Central Trustees") at 39. The cases on prematurity cited above take just the opposite approach.

the answer depend on whether the railroad continues to have an obligation to provide rail service, and if so to what extent does Penn Central have such an obligation? Does it depend on whether liquidation value for nonrail purposes is higher than value in rail use, and how are these two values to be measured?

(b) Is the consideration for Penn Central rail assets to be valued, for constitutional purposes, at its market price in an existing market, or can an appraisal based on earnings projections be employed by the court that makes the determination? Does the answer depend on the right of railroad investors to liquidate their investment for cash, and if so do they have such a right?

The New Haven Trustee offers his own theoretical answers to these questions as posed in the abstract. He would have this Court adopt his answers now despite the fact that on the present record, regardless of how any of these questions is answered, it cannot be demonstrated that Penn Central will (or is likely to) receive less for its properties than the "constitutional minimum" consideration, or less than Penn Central could obtain by following any alternative course of action.[16] It is stipulated that at present the parties do not know what assets are involved, what their value is on *any* basis, or what the value of the consideration provided in the Final System Plan will be. Many factual questions are therefore open:

(a) The Penn Central rail assets to be transferred pursuant to the Final System Plan are unidentified. As stipulated, it is likely that some Penn Central rail assets will be transferred, but it is not known how much of the Penn Central system will be transferred and how much will be left in the estate. Equally important, it is not known which parts of the system will be transferred. If the answer to the constitutional valuation questions depends on whether the assets to be valued have greater value for rail or nonrail purposes, or on how much net income the assets can be expected to generate in rail operations, then it is not possible now even to articulate a useful general principle for valuing the transferred assets. JA 317 at 318-19.

(b) The identity of the transferees of Penn Central assets is also unknown. The Final System Plan may provide for transfers to existing profitable railroads, to state, local, and regional transportation authorities, and to Amtrak, as well as to Conrail. The constitutional questions presented by the New Haven Trustee relate only to transfers to Conrail. It is stipulated, however, that it "will not be possible to ascertain until completion of the planning and approval process required by the Act . . . which rail properties of Penn Central will be designated for transfer or conveyance to Consolidated Rail Corporation . . . ." JA 317 at 319.

(c) Nothing is known about the value of the rail properties to be transferred pursuant to the Final System Plan. It is stipulated that their liquidation value is unknown and cannot be ascertained now. It is further stipulated that their value on any basis other than liquidation is unknown and cannot be ascertained now. *Id.*[17]

[16] There is only one alternative course of action that even the New Haven Trustee is prepared to advocate: federal condemnation of the Penn Central rail system. But even apart from the political, economic, and competitive problems inherent in nationalization of a single railroad, the New Haven Trustee does not have a constitutional right to have Penn Central's properties condemned. See Part II *infra*.

[17] Moreover, very little is known about the value of the whole Penn Central rail system on any basis. The Day & Zimmerman study summarized by the New Haven Trustee is, as he notes, dated near the beginning of the reorganization (December 31, 1970), and its conclusions have not been passed upon by the ICC or any court. Brief of Cross-Appellant at 79. He might have added that the study was not prepared for the purpose of constitutional valuations, and

(d) It is also stipulated that the value of the consideration that will be exchanged for properties transferred to Conrail is unknown and cannot be ascertained now. See *id.* Transferor rail estates can receive up to $500 million in USRA obligations guaranteed by the Federal Government [18] plus all of

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the numerous assumptions made by Day & Zimmerman have not been analyzed in terms of their relevance to the present case. The New Haven Trustee's attempt to construct a concrete factual setting for the "permanent taking" issues underscores their prematurity. There is no reason for this Court to charge into the constitutional thicket by assuming, as the New Haven Trustee invites it to do, that at least 50 percent of the Penn Central system's psysical assets will be transferred to Conrail. *Id.* Such an assumption finds no support in the facts which the parties were willing to stipulate for the purposes of this case. JA 317 at 319. The actual figure may be more, or less; and there is no reason to assume that the value of all assets transferred will be representative of the value of all of the assets studied by Day & Zimmerman.

[18] The New Haven Trustee's repeated assertion that this will require the affirmative approval of Congress is flatly wrong. See Brief of Cross-Appellant at 49, 52, 54, 76 n. 67, 80. Section 210 authorizes USRA to issue bonds, debentures, trust certificates, securities, or other obligations in an amount up to $1.5 billion. It provides that the Secretary of Transportation must guarantee the payment of principal and interest on all such obligations if requested by USRA (Section 210(c)), and authorizes both direct appropriations and the sale of public debt to enable the Secretary to discharge the obligations of the United States thus incurred (Section 210(e),(f)). These authorizations are complete in themselves and are not conditioned on any further congressional action. Under Section 210(b), up to $500 million of the USRA obligations may be made available to Conrail for the acquisition of properties under the Final System Plan. Section 210(b) requires a joint resolution by Congress only for "[a]ny modification to the limitations set forth in this subsection."

Section 206(i), on which the New Haven Trustee relies, does not contradict Section 210. That provision applies only to such securities of *Conrail* as may purport to impose *direct* obligations on USRA (by, for example, purporting to obligate USRA to make payments into a sinking fund). Section 206(i) does not apply to USRA obligations issued under Section 210 independent of Conrail securities. Nor does Section 206(i) apply to Conrail securities which obligate USRA only indirectly (by, for example, being secured by USRA obligations through a collateral trust indenture).

[Footnote continued on next page]

the common stock of Conrail plus other securities of Conrail. The guaranteed obligations will presumably have a market value equal to their stated value. The value of the Conrail stock and securities will obviously depend on the terms of the securities, which are unknown, and on the earning capacity of Conrail, which in turn depends on what assets are transferred to it.

(e) There is no basis today for comparing the consequences to any particular class of claimants of alternative courses of action. In fact, whether anyone will receive less through implementation of the Final System Plan than he would receive from some alternative course of action cannot be determined without examining the positions of particular classes. For example, the $250 million in labor protection benefits provided in Section 509 of the Act may be of considerable relevance to persons whose claims will be primed by labor claims resulting from termination of operations and liquidation of the estate.

The Penn Central Trustees argue that the "permanent taking" issues are ripe for adjudication now because, among other things, the 180-Day Decision has been entered, an event which the court below noted was still *in futuro* when it decided the case. Brief of Appellants Penn Central Trustees at 48-51. Entry of the 180-Day Decision has done nothing to cure the factual inadequacy of the record, or to make possible the framing of con-

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[18] [Continued]

If Congress had intended Section 206(i) to prevent USRA from issuing any obligations without a joint congressional resolution, there would have been no need for Section 210's requirement of a resolution to authorize USRA obligations in excess of the limits there specified. When the two provisions are read together, it is clear that, as long as the obligational limits of the Act are not exceeded, no affirmative approval is required for USRA obligations. The requirement of approval of *Conrail* securities that purport to establish the Association as the direct or primary obligor is an altogether different matter.

crete as opposed to hypothetical legal issues concerning the alleged taking. In fact, to the extent that the 180-Day Decision is relevant to the ripeness of the "permanent taking" issues, that decision makes the issues more hypothetical because the Penn Central 180-Day Decision was against reorganization under the Rail Act.

2. *Erosion Allegations*

The present record is also inadequate, in two respects, to adjudicate the alleged "erosion" taking. In the first place, even if there were agreement on a definition of "erosion" and even if the law defining its constitutional limits were established, the record in this case would be insufficient to indicate whether or to what extent there is or will be any erosion injury to anyone. In the second place, as Judge Fullam recognized, the erosion question can be properly answered only by comparing the present position of the estate with the expected consequences of the reorganization process. Even if creditors had no obligation to the public to stay their hands and risk a decline in their recovery for the period necessary to reorganize into a "self-sustaining rail service system," the existence of any injury to them could be determined only by comparing the consequences of some feasible alternative available now with the consequences of reorganization under the Rail Act.

The first of these points is discussed in Part III of our Brief as Appellant. We argue there that the limited facts of record do not demonstrate that the value of the Penn Central estate available to satisfy pre-bankruptcy claims is declining.[19] We will not repeat that argument

[19] Brief of Appellant USRA at 75-77, 79-82. The statement in the Brief of Appellants Penn Central Trustees (at 33) to the effect that the Government parties concede that "there has been very substantial erosion" is therefore not an accurate statement of our position.

here. The strongest indication of the inadequacy of the record with respect to erosion is what the court below actually did after it determined that the erosion issue was "ripe for adjudication." The court did not define erosion. It did not define the constitutional limits on erosion. It did not determine whether or to what extent erosion of the Penn Central estate has actually occurred or will occur. The court below simply left these questions to some other court and declared Section 303 of the Rail Act unconstitutional "insofar as" it fails to provide compensation for erosion that some other court may or may not find and determine to be constitutionally compensable.

The Penn Central Trustees argue that, when some court ultimately does make findings on erosion, it will not be entitled to consider appreciation in asset values, particularly the values of non-rail assets. Brief of Appellants Penn Central Trustees at 32-33. Their argument cites only *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), whose inapplicability we demonstrate elsewhere, and ignores the contrary authority, *In re Boston & Maine Corp.*, 484 F.2d 369, 373 n. 5 (1st Cir. 1973).

Nothing in reason supports the Trustees' argument. Erosion has two major elements: the continued accrual of post-bankruptcy claims which are entitled to priority over pre-bankruptcy claims, and the decline, if any, in the total value of the estates from which all claims—both pre- and post-bankruptcy—must be satisfied. We fail to understand why a court should not consider increases in the value of assets owned by the estate during the reorganization process, which obviously affect the latter element. Post-bankruptcy claims are against the entire Penn Central estate, and they have a first call on both rail and non-rail assets. To the extent that increases in the value of assets provide dollars which can

satisfy post-bankruptcy claims, these increases reduce any erosion injury to the pre-bankruptcy interests.

The fact that various assets which increase in value may be subject to different mortgages does not mean that increases in these asset values do not cushion erosion. Post-bankruptcy claims have a first call on every asset of the estate, including mortgaged assets. Increments in the value of mortgaged assets are available to satisfy these claims, leaving a greater asset value available to satisfy pre-bankruptcy claims.

Moreover, in any complex railroad reorganization, creditors with different security will be affected differently by erosion, no matter how it is measured. There is an inherent theoretical problem in balancing the interests of creditors secured by properties whose value is allowed to decline in the reorganization process against the interests of others in reorganizing. This problem is neither solved nor exacerbated by taking changes in asset values into account, but doing so provides a more accurate measure of overall injury.

Moreover, while the cushioning effect of an increase in asset values may in fact be different for different pre-bankruptcy claimants, the record before this Court does not permit an analysis of any such differences.

Even if the record were adequate to determine whether the value of the Penn Central estate is declining because of continued operations, the constitutional issue could not be satisfactorily resolved now. The underlying issue is whether Penn Central's creditors have a present constitutional right to realize present liquidation values by forcing the railroad to cease operations and liquidate immediately. Plaintiffs contend that this Court gave them that right in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), holding that owners of a small railroad that was losing money and had no prospect of becoming profitable could not be compelled by a state

to continue rail operations. However, the public also has a right, established in a series of cases under Section 77,[20] to require a railroad to continue its operations pending reasonable efforts to reorganize it to be self-sustaining. The question, therefore, is whether the *Brooks-Scanlon* principle or the reorganization principle is applicable to the present case. The answer to that question depends upon the constitutional adequacy of the transfers pursuant to the Final System Plan and cannot be determined now. As Judge Fullam stated, the erosion issue "cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce." JA 9 at 60.

Judge Fullam himself escaped from the force of his own argument and concurred in the decision below. He did so, however, by an erroneous reasoning process. He apparently reasoned that the public's right to require continued operations during a reorganization depends upon "reasonable present assurance that the end result of the statutory process would be the receipt of consideration for the assets and other benefits in amounts equaling at least liquidation value plus interim erosion," *id.*; and he joined the majority in concluding that Section 303 of the Rail Act prohibits any compensation for erosion, so that if there is any erosion at all, his test is not met.[21]

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[20] *E.g.*, *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935); *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946); *Penn-Central Merger Cases*, 389 U.S. 486 (1968); *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

[21] It is not entirely clear from his concurrence that Judge Fullam read Section 303 as both denying to the Special Court the power to take erosion into account in fixing the consideration for the transfer and requiring the Special Court to award the constitutional minimum for the rail assets transferred. JA 9 at 60. That he so read Section 303 is clear, however, from his 180-Day Decision in the Penn Central case, JA 124 at 149; that the majority of the court below so read Section 303 is clear from the declaratory judgment, JA 9 at 82.

In fact, both premises are wrong. As we argue in Part III of our Brief as Appellant, creditors of a railroad that can be reorganized successfully do not have a constitutional right to be paid for their participation in the reorganization process. As we argue in Part II of that Brief, there was no reason for the court below to construe Section 303, which explicitly requires consideration equal to the "constitutional minimum," as excluding consideration for interim erosion if the Special Court determines that such consideration is constitutionally necessary. Even on Judge Fullam's theory, the ultimate question is whether the value of the federally guaranteed USRA obligations plus the going-concern value of a federally assisted Conrail (which will be wholly owned by the rail estates presently in reorganization) and other benefits will be sufficient to provide the "constitutional minimum" consideration required by Section 303 for the assets transferred to Conrail. If the Special Court determines that what is required is sufficient value to place the pre-bankruptcy claimants in as good a position as they would have been in had they liquidated at some date earlier than the actual transfer to Conrail, neither the Rail Act nor the record demonstrates that the Special Court will be unable to award such consideration.

Judge Fullam resolved his own dilemma by simply construing Section 303 of the Act in a manner that made the section unconstitutional on its face: he construed it to prohibit payment of part of the constitutional minimum the section itself commands. Once that construction of Section 303 is rejected as unwarranted, we are back to his original problem. The record does not even begin to demonstrate that the consequences of implementing the Final System Plan will be worse for any class of claimants than the consequences of any feasible alternative.

B. When Plaintiff's "Taking" Allegations Become Ripe for Adjudication, He Will Have Full and Adequate Opportunities To Present Them to a Federal Court

It is clear that the present record does not permit the adjudication of the "taking" allegations except on a hypothetical and speculative basis requiring the decision of a large number of constitutional and statutory issues many of which may never arise if the facts are allowed to develop. The court below recognized this when it explicitly declared that the issues relating to the transfers under the Final System Plan are premature and left the central issues relating to erosion to be decided by some other court. However, Justice Frankfurter's test (p. 16 *supra*) suggests a second criterion of ripeness: will it be possible for this Plaintiff to bring the issues before a federal court at a later time on a better record and obtain adequate relief if the claims prove to have merit? The answer to that question in this case is yes.

Section 303 of the Rail Act provides that the Special Court, subject to review by this Court, shall review the Final System Plan to determine whether it is "fair and equitable" to the estate of each railroad in reorganization. Both the text of Section 303 and its legislative history [22] make it clear that the question in that review proceeding will be whether each railroad estate has received the "constitutional minimum" consideration for rail assets transferred pursuant to the Final System Plan. The court below notwithstanding, the Special Court will have power, if it determines that the "constitutional minimum" should reflect not only the value of the rail assets on the day of transfer but also the cost of keeping the railroad operational prior to the

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[22] See, for example, H.R. Rep. No. 93-620, 93d Cong., 1st Sess. 2, 31, 43, 54 and 55 (1973) ("House Report"); 119 Cong. Rec. H9732, H11,876 (daily ed. Nov. 8 and Dec. 20, 1973).

transfers, to take any such "erosion" burden into account and provide compensation therefor.[23]

To correct any unfairness in the Plan, the Special Court may reallocate the Conrail securities, order the issuance of additional Conrail securities and USRA obligations (subject to the $500 million limit in Section 210(b)), and if necessary enter a deficiency judgment against Conrail. Section 303(c). These remedies may fully correct any deficiencies in the terms of the transfers.[24] It is therefore altogether possible that the statutory process itself will provide a fully adequate opportunity for a federal court to resolve the issues that Plaintiff has presented here.

The New Haven Trustee objects, however, to the fact that the Special Court's determination of fairness and

[23] See also Brief of Appellant USRA at 71. The Penn Central Trustees' reliance on a snippet of egislative history to support the argument that the Special Courtmay not take erosion into account in determining whether the terms of the transfers are fair and equitable is clearly misplaced. Bref of Appellants Penn Central Trustees at 41 n. 14. The committee report quoted obviously misstated the draft bill on which it was commenting, for Section 102(5) of the draft explicitly permited rail properties to be valued as of a date in advance of conveyance.

[24] The New Haven Truste suggests that the deficiency judgment against Conrail authorized by Section 303(c) is a worthless remedy. Brief of Cros-Appellant at 53. It may be that such a judgment would be ineffective in correcting any substantial shortfall in the consideration received by the Penn Central estate, since that estate will probably be the largest single holder of Conrail securities. However, the remedy could serve some purposes that additional seurities would not serve as well. For example, if properties transferred by one of the smaller estates or one of Penn Central's Secondary Debtors were found to have been unfairly appraised and if the Special Court found that the transferring estate was entitled to the kind of priority over other claimants that a deficiency judgment would represent, the court might award such a judgment. Or, as we note at p. 50 *infra*, a deficiency judgment might provide the means to award the equivalent of cash to estates whose properties are sold by Conrail to Amtrak for cash, if the Special Court concludes that fairness requires such a result.

equity will not occur until after the transfers pursuant to the Final System Plan have taken place. This procedure, which Congress modeled on the procedure approved by this Court in the *Penn-Central Merger Cases*, is obviously not objectionable in itself.[25] When a Final System Plan for self-sustaining rail service has been formulated, it will be sensible to implement the Plan first and turn to the inevitably lengthy valuation process afterwards. Indeed, one of the explicit purposes of the two-step arrangement is to relieve the estates in reorganization of the burden of rail operations as quickly as possible, an objective the New Haven Trustee should be expected to applaud.

What the New Haven Trustee's objection comes down to is the alleged possibility that the total amount available to the Special Court to award—at least $500 million in federally guaranteed USRA obligations plus securities of Conrail and other benefits available under the Act—will not be sufficient to pay the constitutional minimum value of the assets transferred to Conrail.[26] The New Haven Trustee's contention is that the constitutional issues must be decided now, on the hypothetical supposition that the total value will be inadequate, because if the issues are left to the Special Court, it may be too late. To this argument there are several answers.

The first answer is that if the consideration available for property transferred to Conrail under the Final System Plan should prove to be inadequate, Plaintiff will have an adequate remedy in the form of a suit in the Court of Claims under the Tucker Act, 28 U.S.C.

[25] See *Penn-Central Merger Cases*, 389 U.S. 486 (1968). Nevertheless, the New Haven Trustee contends that the two-step procedure is objectionable in itself. His contentions are answered in Part III of this Brief.

[26] The Brief of Appellants Penn Central Trustees makes essentially the same argument at 41-42, 56-61.

§ 1491. This point has been argued in Part I of our Brief as Appellant, and the argument will not be repeated here.

The second answer is that even if it were determined that no Tucker Act remedy is available, there would remain an adequate opportunity for a federal court to hear Plaintiff's claims, if and when they become ripe, and to provide an appropriate remedy. With respect to the erosion claims, this point requires no demonstration, because it is implicit in the decision below. Since the court below found it necessary to leave to the Reorganization Courts or other federal courts the determination whether erosion of any rail estate has reached constitutional limits, it could and should (in the assumed absence of a Tucker Act remedy) have left it to the same other courts to fashion an appropriate remedy. There was no reason for the court below to grant a remedy for a claim of injury that it did not and could not adjudicate.

With respect to the implementation of the Final System Plan, there will also be an opportunity to present claims to a federal court on a concrete basis after the terms of the Final System Plan are known. On the rationale of the court below, one possibility would be a later suit before the same or a different three-judge court. The text of the Plan will be available at least when it is submitted to Congress by USRA pursuant to Section 208, and the Plan cannot become effective until 60 days have passed during which neither house of Congress has disapproved it. USRA is not required to transmit the Plan to the Special Court until 90 days after this 60-day period has ended, Section 209(c), and transfers of the rail assets need not occur until as much as 20 days thereafter, Sections 303(a), (b). Nothing in the Act prevents Plaintiff or others from seeking a temporary or permanent injunction against the transmittal. Indeed, the court below issued an unqualified permanent

injunction against the transmittal of *any* Final System Plan.[27] On that court's rationale, there is no reason why it could not, at the very least, have delayed this order until it had before it an actual Final System Plan whose constitutionality or unconstitutionality it could adjudicate on the merits.

To be sure, Section 209(a) provides that the Final System Plan is not subject to "review" except in accordance with Section 209, and Section 209(b) provides for the consolidation before the Special Court of all "proceedings with respect to the final system plan." But if enjoining USRA from transmitting a Final System Plan to the Special Court constitutes the type of "review" which courts other than the Special Court are prohibited from engaging in, then the court below lacked jurisdiction to enter the order it entered prohibiting any such transmittal; a federal court cannot gain jurisdiction by deciding, prematurely and in the abstract, issues it would have no jurisdiction to decide in a concrete case.

Moreover, the Special Court will have original or transferee jurisdiction to adjudicate constitutional objections to the Final System Plan after the Plan becomes effective. Section 209(a) provides that:

> "After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties."

If a substantial showing were made to the Special Court of a likelihood that the value of the consideration avail-

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[27] As noted in our Brief as Appellant, the reason why it did so is something of a mystery since it declared the "permanent taking" issues premature and offered no explanation of this particular provision. Brief of Appellant USRA at 73-74.

able was less than the constitutional minimum value of the rail properties to be conveyed, the Special Court could hardly refuse to delay the transfer pending adjudication of the claim on the ground that Congress had directed it to order prima facie unconstitutional transfers. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).[28]

Finally, the Rail Act should not read as compelling a transfer order under such circumstances. Section 303(b) provides that the Special Court "shall" order conveyance of the rail properties. But the Special Court has the powers of a district judge, including those of a reorganization court, Section 209(b), and the discretion of a court of equity to do justice under the circumstances, *cf. Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944).[29]

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[28] The provision in Section 303(b)(2) that the transfers "shall not be restrained or enjoined by any court" is clearly addressed to any other court that might be asked, once Section 303(b) becomes operative, to enjoin the Special Court from ordering the transfer of rail properties. It is not a limitation on the authority of the Special Court itself to withhold its transfer order if it is not satisfied that the plan is at least *prima facie* fair and equitable. Section 502(f) of the House Committee bill contained, in addition to the ban on injunctions, a provision that "conveyances shall not be deferred by reason of any controversy concerning the value of the rail properties to be conveyed . . . ." House Report at 11. This language, which might have been read as a restriction on Section 209(a) jurisdiction, did not survive passage.

[29] The apparent directive to order transfers first, with valuation to occur later, must also be read against the background of Congress' strong belief that the Final System Plan would be constitutionally adequate, and that each rail estate would receive the "constitutional minimum" for the properties transferred. For example, the House Committee's statement that "no litigation should be permitted to delay the Final System Plan" (House Report at 55) followed a careful analysis of the payment provisions and confident assertions that the statutory plan was without defects and ensured claimants of the "constitutional minimum" consideration. See S. Rep. No. 93-601, 93d Cong., 1st Sess. 6-7 (1973), commenting on the Senate Committee version of Section 303(b), not on Section 209(a).

The language of Section 303(b) that appears to compel the transfers on a date certain can be read literally without creating any constitutional problems if this Court agrees that a Tucker Act remedy would subsequently be available to cure any constitutional deficiency in the consideration furnished under the Rail Act. If this Court concludes that the Tucker Act has been repealed *pro tanto*, we submit that it should read Section 303(b) in a manner that will save its constitutionality and give effect to Congress' concern that the rail estates should receive their constitutional due. The Court can accomplish that by interpreting Section 303(b) to permit the Special Court to decline to order the transfers if, in the exercise of its jurisdiction under Section 209(a), the Special Court concludes that the Final System Plan does not meet a *prima facie* test of constitutional fairness and equity.

The argument made in the Brief of Appellants Penn Central Trustees (at 53) that because the Special Court would have only ten days within which to act, Congress did not intend the Special Court to have discretion to refuse to order a transfer overlooks the fact that there can be as much as 110 days between the effectiveness of the Final System Plan and the date of transfer. See Sections 208(a), 209(a), (c), 303(a), (b).

There is, of course, no reason now to assume that there will be any constitutional defect in the Final System Plan that would delay or prevent the transfers. The only question now is whether it is appropriate to decide that the Final System Plan will necessarily be constitutionally defective before anyone has seen it. The New Haven Trustee has offered no good reason for doing so.

II. THE TRANSFER PROVISIONS OF THE RAIL ACT DO NOT VIOLATE THE SUBSTANTIVE RIGHTS OF CREDITORS UNDER THE FIFTH AMENDMENT

The Rail Act contemplates that rail properties designated in the Final System Plan for transfer to Conrail will be exchanged for (1) securities of Conrail, (2) up to $500,000,000 of USRA obligations guaranteed by the United States, and (3) "other benefits" conferred by the Act. The New Haven Trustee attacks the provisions authorizing this exchange as a governmental taking of the New Haven's property without just compensation and as a deprivation of property without substantive due

process of law, both in violation of the Fifth Amendment.[30] He concedes that the public interest probably requires continued operation of a Northeast rail system including many present Penn Central properties, but he asserts a right to withdraw the New Haven's investment in those properties and to be compensated for that investment in cash—in effect, a right to have the railroad in which he is an investor condemned.

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[30] The New Haven Trustee poses as the second "question presented" whether he has standing to assert that certain provisions of the Rail Act, if not enjoined, would cause injury to the New Haven estate. Brief of Cross-Appellant at 3. When the New Haven Trustee challenged the facial constitutionality of the entire Rail Act in the court below, no one disputed his standing, and USRA does not do so here. However, in view of the New Haven Trustee's description of his claims against the Penn Central estate (see, *e.g.*, Brief of Cross-Appellant at 19, 34-35, 68), we are constrained to point out that the nature and validity of these claims are not at issue in this case.

There may well be important unresolved questions about the New Haven Trustee's status as a claimant against the Penn Central estate. Any such questions will exist whether or not the Rail Act is held constitutional and will presumably be resolved in due course by the Penn Central Reorganization Court in proceedings in which the New Haven Trustee, the Penn Central Trustees, and other parties to the Penn Central reorganization will have an appropriate opportunity to be heard. The present litigation should not lead this Court to decide questions about the New Haven Trustee's status that are irrelevant to the constitutionality of the Rail Act, were not put in issue below, and should be resolved in other proceedings.

The fact that the New Haven Trustee's standing to raise the constitutional issues presented has not been challenged does not demonstrate that he would in fact be injured in any respect by the operation of the Rail Act. For example, although the New Haven Trustee says that the Rail Act threatens the "collectibility" of his claims, the record in this case does not demonstrate either that the claims are "collectible" in the absence of the Rail Act or that the claims are uncollectible in the presence of the Rail Act. In fact, the record does not permit even a guess as to the consequences to the New Haven Trustee (or any other claimant) either of proceedings under the Rail Act or of any feasible alternative course of action.

The court below held that the New Haven Trustee's attack on the transfer provisions was premature and declined to adjudicate the issues raised, a ruling we believe was clearly correct.[31] Even if the issues he raises were ripe for decision, we submit that the New Haven Trustee has no constitutional right to be "cashed out" of his investment in Penn Central. The exchange provisions of the Rail Act are a legitimate exercise of the congressional power to provide for the adjustment of claims in bankruptcy and are fully consistent with Fifth Amendment principles governing the exercise of that power.

A. Congress Has Broad Authority To Provide for the Adjustment of Creditors' Claims in Corporate Reorganizations

The New Haven Trustee asserts that Congress cannot, under present circumstances, provide for continued private operation of rail service in the region through corporate reorganization measures, but must resort to the power of eminent domain. Viewing the Rail Act as an exercise of that power, he alleges that Congress has taken his property without paying the "just compensation" required by the Fifth Amendment. He further contends that the Act's provision for an exchange of rail properties for securities of Conrail and other consideration is constitutionally deficient because the Fifth Amendment requires that compensation for a condemnation be in money only.[32]

This attack is unfounded. The New Haven Trustee does not have a constitutional right to be bought out for cash as a condition for the continuation of rail service. Decisions of this Court establish beyond doubt that the Act is a legitimate and constitutionally permissible exercise of the bankruptcy power. There is no occasion for

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[31] See Part I *supra*.

[32] Brief of Cross-Appellant at 55-60.

this Court to decide whether, if the Act were instead a condemnation, money would be the required medium of payment.[33]

[33] It is not at all clear that money would be the only permissible form of compensation even if the Act were a condemnation law. This Court has never held that the Constitution requires compensation in legal tender for an exercise of the power of eminent domain. As the New Haven Trustee notes, two Justices of this Court sitting on circuit in 1795 ruled that compensation for a governmental taking of land must be in money. *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304 (Cir. Ct., Pa. Dist. 1795). However, that decision construed the Pennsylvania constitution, not the federal, as this Court has since expressly noted. See *Satterlee* v. *Matthewson*, 27 U.S. (2 Pet.) 380, 414 (1829). The New Haven Trustee cites subsequent cases containing dicta to the effect that a property owner is entitled to cash or to "the monetary equivalent" of condemned property. Brief of Cross-Appellant at 56-60. However, none of those cases involved an attempt by Congress to provide compensation in non-monetary form, and the courts' use of the term "monetary equivalent" appears to have been only a shorthand way of saying that the compensation must be equivalent in value to the property condemned.

The New Haven Trustee says that the *Monongahela* case "squarely answered" the question whether the compensation for a condemnation may be in a form other than money. *Id.* at 57. In fact, that case had nothing to do with the question. The issue there was not the *form* of compensation but the *amount* to which the condemnee was entitled. This Court held merely that Congress may not, by disregarding part of the value of the property taken, reduce the amount of compensation received by the owner. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).

In fact, it is established that even in condemnation cases Congress may require an exchange of property for a nonmonetary consideration in appropriate circumstances. For example, the compensation for a taking of property may be reduced by the value of other benefits conferred on the owner, such as increases in the value of adjacent land. *E.g.*, *Bauman* v. *Ross*, 167 U.S. 548, 574-75 (1897); *United States* v. *1,000 Acres*, 162 F. Supp. 219 (E.D. La. 1958). The Rail Act, as noted elsewhere, confers a variety of benefits on the estates of railroads reorganized under it, whose value cannot be determined at this time. And, as we demonstrate in text, in a reorganization the rights of creditors are satisfied if they receive "full compensatory treatment" in nonmonetary form. *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 529 (1941). The guiding principle, that the owner is entitled to the full equivalent of his property, simply cannot be reduced to a flat rule that money must be the medium of any mandatory exchange.

Section 77 is strong precedent for the view that creditors of a bankrupt railroad can be compelled to accept securities in a restructured enterprise in exchange for their interests in the bankrupt. Under Section 77, a reorganization court may (a) stay the foreclosure of liens against a railroad's property pending efforts to reorganize the railroad, and (b) confirm a plan of reorganization developed and approved by the ICC, under which the claimants are not permitted to liquidate the debtor but receive interests in a recapitalized corporation which carries on the debtor's railroad operations. Although Section 77 partially reflects the general purpose of the Bankruptcy Act to permit the creditors to share in the debtor's assets, it also

> "reflects a public policy that the operation of railroads as sound, economic units should be achieved

The Brief of Appellants Penn Central Trustees (at 61 n. 31) questions whether the $250 million in labor benefits provided in Title V, for example, may be taken into account as part of the consideration for the transferred rail properties. If Penn Central cannot now abandon properties without incurring significant labor protection costs, then the statutory scheme providing for $250 million of those costs to be borne by the Government clearly benefits any Penn Central claimant whose claims would be primed by the labor protection claims. At a minimum, the $250 million in labor protection payments would benefit the Penn Central shareholders, for whom the Penn Central Trustees express concern. *Id.* at 56 n. 23.

It is simply not true that "[t]here is . . . but one medium of exchange which is the 'perfect equivalent of the property taken,' namely money." Brief of Cross-Appellant at 58. Under the Rail Act, the transferor estates and their creditors may be granted liens on or other interests in *the transferred properties themselves*, as in any reorganization, supplemented by over $2,000,000,000 of federal assistance and other benefits. See Brief of Cross-Appellant at 48 n. 42. The valuation provisions of Section 303, backed up by the Tucker Act remedy, will ensure that the consideration is equal to the "constitutional minimum."

> for the benefit of the public, regardless of the interests of creditors and stockholders." 5 Collier on Bankruptcy ¶ 77.02, at 469 (14th ed. rev. J. Moore 1974).

In short, the basic goal of Section 77 is "that the reorganized company should, if at all possible, emerge as a 'living, not a dying . . . enterprise.'" [34]

It is beyond question that Section 77 does not violate the taking or due process clauses of the Fifth Amendment by requiring railroad investors to accept securities in a viable recapitalized corporation that continues to meet the public need for rail service, instead of permitting them to liquidate the railroad by enforcing their claims. See *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935). This Court has specifically upheld the "cramdown" provision—unique to rail reorganizations—which allows the reorganization court to substitute its conclusion that the plan is fair and equitable for the assent of reluctant classes of claimants. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495, 533 (1946).

Moreover, this Court has stressed that Section 77 does not exhaust the congressional powers in this field. In upholding Section 77 in the *Rock Island* case, the Court reviewed the history of bankruptcy legislation since 1800 and concluded that

> "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.
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> ". . . And these acts, far-reaching though they be, have not gone beyond the limit of congressional

[34] *New Haven Inclusion Cases*, 399 U.S. 392, 421 (1970), quoting *Van Schaick* v. *McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941).

> power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." 294 U.S. at 668, 671.

The Rail Act constitutes a further extension into that field. The language and legislative history of the Act make it clear that Congress regarded it as a further exercise of the power to legislate with respect to railroad reorganization—creating a new reorganization procedure tailored to meet the regional and national demands of the Northeast rail crisis, rather than condemning the properties of the railroads for public ownership. The Act creates a mechanism whereby the pending Section 77 proceedings may be partially combined and the reorganization of the debtors may be facilitated by merging any or all of their rail properties into a consolidated rail network.

The New Haven Trustee points out that the Rail Act differs in certain respects from Section 77, and he argues that those differences take it beyond the constitutional limits on the power to adjust claims in reorganization—as distinguished from the power to condemn property for public use. The differences between the Rail Act and Section 77 are precisely what give the Act a chance of producing a successful reorganization of the Northeast railroads where Section 77 has proven inadequate.[35] Congress is not tethered to old forms and procedures in solving new reorganization problems; rather, the "capacity of the bankruptcy clause to meet new conditions" is an essential feature of the constitutional grant.[36] As we demonstrate below, each of the features of the transfer provisions to which the New Haven Trustee objects has firm support in judicial decisions under Section 77 and other bankruptcy laws. In light of the flexibility accorded to Congress in its exercise of the bankruptcy power, there is

[35] See also pp. 72-75 *infra*.

[36] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, *supra*, 294 U.S. at 671.

little question that the Act is a constitutionally permissible solution to the problem of reorganizing the Northeastern railroads.

B. The Mandatory Nature of the Transfers Does Not Establish that the Rail Properties Are Being Condemned

The New Haven Trustee points out that the Rail Act does not provide for the submission of the Final System Plan to claimants for approval or provide discretion in the Special Court to disapprove the Plan. Rather, the Act directs that, once the Plan has been reviewed by Congress and has become effective, the Special Court is to implement it within 110 days, subject to subsequent review of the fairness of the consideration provided. Sections 209 (c), 303(a), (b).[37] In contrast, as noted above, Section 77(e) requires as a general matter that a reorganization plan be approved by two-thirds of each class of claimants; and it permits a reorganization court to decline to confirm a plan if it finds that the plan is not "fair and equitable." The New Haven Trustee appears to contend that any exercise of the bankruptcy power must retain similar features and that the lack of such features in the Rail Act makes it a condemnation of all properties included in the Final System Plan. In other words, he contends that the claimants against a bankrupt railroad have a Fifth Amendment right to approve a reorganization plan and to invoke the discretion of a court not to implement the Plan.[38]

[37] Although these sections do not appear on their face to give the Special Court discretion to decline to implement the Plan, we believe they can fairly be read to allow such discretion if such a reading is necessary to preserve the constitutionality of the transfer provisions. See pp. 31-32 & n. 29 *supra*.

[38] Brief of Cross-Appellant at 55-60, 69 n. 59, 74-76. The New Haven Trustee also argues that the Rail Act's departures from usual practices under Section 77 in these respects deny claimants procedural due process. We respond to that argument at pp. 72-79 *infra*.

In the first place, it should be noted that the Rail Act does not take away any of the voting rights provided by Section 77. The Rail Act is not a substitute for Section 77 but an addition to it. The Rail Act provides for a transfer of some properties of the Penn Central estate in exchange for consideration. In this respect, the whole of the Rail Act is very roughly analogous to Section 77(o), which authorizes a reorganization court to order sales of the debtor's property, *without a vote and "free from liens,"* during the reorganization process. The Rail Act, like Section 77(o), changes the character of the assets of the estate but does not determine the new securities to be distributed by the estate or affect the rights of the creditors and shareholders *inter se*.[39] The plan for satisfying claims against the Penn Central estate will remain to be determined, under normal Section 77 procedures including a vote, after the Rail Act's process has run its course. What the New Haven Trustee is asking for here is not a vote on a plan of reorganization of the Penn Central estate, which is what Section 77 provides for and what he will still get in the Penn Central reorganization, but a vote on the transfer of assets of the estate, which Section 77(o) would not have given him.

An understanding of the New Haven Trustee's demand for a vote nevertheless calls for some analysis of the role of voting in Section 77. A Section 77 reorganization plan generally creates a new capital structure based on the estate's projected future earnings. See Section 77(e); 5 Collier on Bankruptcy ¶ 77.18, at 550 (14th ed. rev. J. Moore 1974). The new securities are distributed to creditors and stockholders according to seniority. If the projected future earnings of the estate are not sufficient

[39] In particular, the Rail Act does not affect the rights of creditors to absolute priority over stockholders and does not purport to change either the principles or the procedures (both described in the Brief of Cross-Appellants at 37-39) for determining the rights of different classes of claimants.

to support a capitalization that will permit all claimants to receive new securities, the stockholders and, if necessary, junior creditors are not permitted to participate in the reorganization. This exclusion of junior claimants is justified by the fact that, assuming the correctness of the ICC's valuation of the estate, their claims against the debtor have no value. See *Ecker* v. *Western P.R.R.*, 318 U.S. 448 (1943).

Section 77(e) requires a reorganization court, before confirming a reorganization plan, to submit the plan to each class of security-holders for approval. If approved by two-thirds of each class, the plan may be imposed on the dissenting members of each class. Submission to any class of stockholders or creditors may be omitted if the ICC finds and the court affirms that the interests of such class "will not be adversely and materially affected by the plan," or that the interests or equities of such class are of "no value." *Id.* Moreover, under the "cramdown" provision, the court may confirm the plan despite the disapproval of any class of claimants if the court determines that the plan is fair and equitable to the rejecting classes and that the rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . . ." *Id.*

The argument that this limited opportunity to vote is constitutionally required even in a Section 77 reorganization runs counter to authorities both in the field of railroad reorganization and under other bankruptcy laws. The long-standing provisions that permit a reorganization plan to be imposed on the dissenting minority of any class of claimants and, under the "cramdown" authority, on dissenting classes of claimants are, as already pointed out, clearly constitutional. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R., supra.*

These provisions in Section 77(e) have a firm historical base. In equity receiverships it was an accepted

practice—even in the absence of an authorizing statute—for the court to impose a plan of reorganization upon objecting creditors. Section 77(e), by codifying that practice, "serves merely to confer upon the District Court in its bankruptcy part a power theretofore existing in its equity part." *In re New York, N.H. & H.R.R.*, 16 F. Supp. 504, 509-12 (D. Conn. 1936).

This Court in upholding the "cramdown" provision did not suggest that its constitutionality depends on the fact that the dissenting class had a prior opportunity to vote for or against its treatment. *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R., supra*, 328 U.S. at 533. And no reasonable argument can be made that Section 77 would be unconstitutional if, instead of authorizing a reorganization court to overrule a negative vote by claimants, it authorized the court to adopt a plan which it found to be fair and equitable to all parties without first submitting the plan to the claimants for a vote. The Fifth Amendment requirement of fairness does not slice that fine. The "cramdown" provision amply protects the creditors by requiring a judicial determination of the fairness and equity of the plan. Similarly, the Rail Act requires a judicial determination that the estates whose properties are transferred under the Final System Plan are receiving fair and equitable treatment. Therefore, there is no constitutionally significant distinction between the "cramdown" feature of the Rail Act and the "cramdown" provision of Section 77.[40]

This conclusion is reinforced by decisions outside the sphere of railroad reorganizations. The New Haven

[40] Insofar as the New Haven Trustee's objection rests on the fact that the Rail Act requires the rail properties to be transferred before the judicial determination of fairness and equity is made, this Court's decision in *New Haven Inclusion Cases* supports the constitutionality of prior transfer as long as fairness can thereafter be assured, as the availability of a Tucker Act remedy guarantees. See pp. 72-79 *infra*.

Trustee suggests that this Court's decisions invalidating the original Frazier-Lemke Act and upholding the amended Act establish that mandatory transfers such as those contemplated by the Rail Act are a deprivation of property without due process.[41] To the contrary, those very cases support the opposite conclusion.

In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), this Court struck down the first Frazier-Lemke Act, which authorized a farmer who defaulted on his mortgage to remain on his property for five years and then to buy the land, free of lien, for its appraised value at the later time. The Court held that the statute took the mortgagee's property without just compensation by depriving him of the right to obtain the market value of the property through a forced judicial sale. However, this aspect of *Radford* was effectively overruled five years later in *Wright* v. *Union Central Life Insurance Co.*, 311 U.S. 273 (1940), where the Court upheld an amended Frazier-Lemke Act which again authorized a farmer-debtor to buy mortgaged farm property at its appraised value at the end of a three-year, rather than a five-year moratorium.[42]

The statute upheld in *Wright* v. *Union Central* permitted neither the creditor to reject nor the court to disapprove the exchange of the creditor's lien for the appraised value of the property three years later—which might well be much lower than appraised value at the time of default. In that respect, it was more mandatory than the transfer provisions of the Rail Act.[43] Nonetheless, this Court held that, even though the creditor had a lien on the property, he could constitutionally be denied the right to enforce it by judicial sale and be compelled to suffer a three-year decline in appraised value, as long as he received the value of the property at the end of the three-year period. The Court said: "Safeguards were provided to protect the rights of secured creditors . . . to the extent of the value of the property . . . . There is no constitutional claim of the creditor to more than that." 311 U.S. at 278. *Wright* v. *Union Central* thus establishes that, notwithstanding *Radford*, Congress may impose the burden of declining values on creditors for a reasonable period, and may use methods other than foreclosure and

[41] Brief of Cross-Appellant at 74-75.

[42] In an interim decision, the Court had construed the amended statute to entitle the mortgagee to insist on a public sale if he was not content to receive the appraised value of the property. *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937). The Court reconstrued the statute to deny the mortgagee that right in *Wright* v. *Union Central Life Ins. Co.*, *supra*, and upheld the statute as reconstrued.

[43] As noted in our Brief as Appellant Section 207(b) of the Rail Act permits each Reorganization Court to decline to order reorganization under the Act if it determines "that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization." Brief of Appellant USRA at 8-10. Thus, any interested parties who believed that the Act's reorganization process would be unfair to the railroad estates have been permitted at least one opportunity to secure a judicial exit from further proceedings under the Act. The orders of the Reorganization Courts under Section 207(b) are presently under review by the Special Court.

The New Haven Trustee states that a ruling by the Special Court that the Rail Act provides a fair and equitable process for Penn Central would be an "order compelling Penn Central to convey its property." Brief of Cross-Appellant at 55. To the contrary, even after a Section 207(b) ruling favorable to further proceedings under the Act, opportunities will exist to prevent any transfer of properties if it can be shown that transfer would violate constitutional rights. As noted earlier, the court below could entertain a request for an injunction after USRA has released a Final System Plan, if a sufficient showing of unconstitutionality could be made. In addition, if constitutionally necessary, Section 303 may be read to permit the Special Court to review the Final System Plan for irremediable constitutional defects before ordering the transfers of properties. See pp. 31-32 & n. 29 *supra*.

judicial sale to assure secured creditors the value of their claims."[44]

The Second Circuit in an intervening decision had anticipated this Court's recognition in *Wright* v. *Union Central* that secured creditors receive their constitutional due as long as they are assured the "equivalent" of their security:

> "Although the sale of property is often the best way to find its value—in a sense it is its value—we are not prepared to say it is the only permissible method. Any other reasonable method of ascertainment should serve as well; *the essential thing is to give the mortgagee the benefit of that value.* Reasonable methods of ascertaining it are obviously open to Congress without infringing the Fifth Amendment. An illustration may be found under sections 77 and 77B (as amended [11 U.S.C.A. § 205, 207]) in the provisions requiring a minority bondholder to accept securities under a plan which has been accepted by two-thirds of his class and approved by the court. *A dissenting secured creditor is thus deprived of his security without a public judicial sale at which he may bid, yet it can hardly be doubted that such a method of ascertaining the value of his security and giving him its equivalent is constitutional.*"[45]

These decisions show that Congress, without committing a "taking" of property for public use, may exercise its bankruptcy power to *require* a secured creditor to

[44] "The result is that [the *Wright* v. *Union Central*] decision seems largely to negate any conclusions drawn from the *Radford* case . . . ." 5 Collier on Bankruptcy ¶ 77.17, at 545-46 (14th ed. rev. J. Moore 1974).

[45] *In re Witherbee Court Corp.*, 88 F.2d 251, 253 (2d Cir.), *cert. denied*, 301 U.S. 701 (1937) (emphasis added). In railroad reorganizations, where the public interest in continuing rail service comes into play, not even a favorable vote of a class is constitutionally necessary, since the "cramdown" power may constitutionally be employed.

surrender his lien and accept the judicially determined value of his security. Moreover, in railroad reorganizations, as the *Denver & Rio Grande* case makes clear, whole classes of claimants may be required against their will to accept payment in securities of a reorganized corporation. There is no basis for the New Haven Trustee's claim that the mandatory conveyance called for by the Rail Act takes it outside the constitutional ambit of reorganization legislation.

The New Haven Trustee argues that the *Rock Island* and *Wright* v. *Union Central* decisions, although upholding Section 77 and the Frazier-Lemke Act, "explored the outer limits of Congress' power to pass laws for the relief of debtors"; he asserts that they established "[b]y implication" that any bankruptcy law "which deprives a pledgee or mortgagee to a greater extent [than the statutes involved there] is a violation of the Due Process clause of the Fifth Amendment."[46] Those decisions contain no such implication. As the Court said in *Rock Island*, "these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." 294 U.S. at 671. One searches the cited decisions in vain for a suggestion that the congressional power to innovate in the bankruptcy field was exhausted by 1940. The decisions establish instead that secured creditors may be required to defer their claims for a reasonable period and that, as long as they are assured protection "to the extent of the value of the property"[47] at the end of the deferral period, Congress may devise new reorganization solutions for new economic problems as they arise.

[46] Brief of Cross-Appellant at 74, 75.

[47] *Wright* v. *Union Central Life Ins. Co.*, *supra*, 311 U.S. at 278. See also *Consolidated Rock Products Co.* v. *DuBois*, *supra*, 312 U.S. 510, 529 (1941).

In sum, where Congress exercises its bankruptcy power to adjust claims in reorganization, no governmental taking of property for public use is involved unless the value of the interests received by claimants is less than the constitutional minimum value of their previous property rights. Should the value received by claimants fall short of the constitutional minimum, the result may be a governmental taking, but only to the extent of the shortfall; and only to that extent, if at all, need cash payment be made. No taking would ordinarily occur in a Section 77 reorganization, since that statute does not authorize a reorganization court to require continued rail operations beyond the constitutional limit of erosion or to require a transfer of interests if the consideration received by claimants is inadequate. Rather, before it permits either an "erosion taking" or a "permanent taking" to occur, a Section 77 reorganization court must dismiss the reorganization proceeding or disapprove the offending reorganization plan.

The situation may be different under the Rail Act in one respect. If the Rail Act is read to contain (1) a directive to USRA to require continued operations beyond the constitutional limit of erosion, or (2) a directive to the Special Court to order the transfers even if the total consideration available is constitutionally inadequate, or both, then Congress may be deemed to have taken property for public use to whatever extent the consideration under the Rail Act may ultimately be found to be insufficient. In that event, a Tucker Act remedy will be available in the amount of the taking—that is, in the amount by which the results of reorganization under the Rail Act have fallen short of constitutional requirements. As long as the Tucker Act remedy is available, the possibility of a shortfall in the value produced through the reorganization process does not render the Rail Act unconstitutional; nor, certainly, does

the possibility of a shortfall make the Act a condemnation of all rail properties included in the reorganized system.

The New Haven Trustee claims that the Penn Central Reorganization Court held one feature of the Rail Act to be an attempted exercise of eminent domain without provision for payment in money.[48] That feature is the Act's treatment of the "Northeast Corridor" between Boston and Washington. The Rail Act provides that some or all of the properties making up the Corridor, if transferred to Conrail under the Final System Plan, may be sold or leased to the National Railroad Passenger Corporation (Amtrak) for improvement to achieve the statutory goal of better high-speed passenger service. The Reorganization Court acknowledged the clear public purpose of these provisions,[49] but appears to have concluded that they amount to an indirect exercise of eminent domain for the benefit of Amtrak, which is impermissible unless any cash payment by Amtrak is passed on by Conrail to the present owners of the property. That conclusion is incorrect.

In the first place, the Rail Act contemplates that Amtrak may lease the Corridor rather than buy it from Conrail, in which case Conrail will receive only rental payments from Amtrak, which will inure to the benefit of Conrail securityholders. Moreover, should Conrail sell the Corridor to Amtrak, that sale would not harm any of the estates from which the properties were originally transferred. Since those estates will have received their full constitutional due in Conrail securities and other consideration, the sale of the Corridor by their new enterprise in exchange for cash that will be used for the benefit of the enterprise will not diminish the value of their interests any more than would Conrail's sales of

[48] Brief of Cross-Appellant at 59-60; see JA 153 at 155.

[49] JA 153 at 155.

any other rail properties—sales which it will be entitled to make subject to the legal limitations applicable to any carrier.

The possible acquisition and resale of Corridor properties by Conrail might stand in a different light if the properties were to be liquidated for nonrail use. However, the Act contemplates that Amtrak will continue to devote the properties to the public transportation purposes to which the debtors originally dedicated them.

Even if the Reorganization Court were correct that the debtors would be constitutionally entitled to receive the cash proceeds of a resale by Conrail of Corridor properties to Amtrak, that conclusion would not render unconstitutional the provisions of the Act relating to the Corridor. Those provisions are wholly permissive, and if the Special Court on review of the Final System Plan determines that a sale to Amtrak would be unfair to any estate, it may refuse to approve the transaction unless some or all of the proceeds are paid in cash to the rail estate. The Special Court could use the deficiency judgment against Conrail authorized by Section 303(2)(C) as a means to require such a cash payment to the appropriate estates.

C. Conrail Will Not Be an Instrumentality of the Federal Government

The New Haven Trustee argues that the Rail Act effects a condemnation, rather than a reorganization, of the debtors' properties because the enterprise that will emerge from the Final System Plan will not be a private corporation as in a Section 77 reorganization but a government instrumentality. He states that "[t]he common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise." [50] That is not so.

[50] Brief of Cross-Appellant at 72.

The Act establishes Conrail as a for-profit corporation and declares that it "shall not be an agency or instrumentality of the Federal Government." Section 301(b). Conrail will not be federally chartered but will be established under the laws of "a state," with its principal office in Philadelphia. Although its incorporators are officials of USRA, their association with Conrail will cease when the securities of Conrail are distributed to the estates of the railroads in reorganization. The only unusual elements of federal control that will continue beyond the moment when the estates become the owners of Conrail are:

1. As long as 50 percent or more of Conrail's outstanding indebtedness consists of obligations of USRA or other debts guaranteed by the United States, a majority of the 15-member board of directors will be USRA officials or other presidential appointees, and Conrail will be subject to federal audit under the Government Corporation Control Act; and
2. Conrail will be required to submit an annual report to Congress and the President detailing its activities and accomplishments. Section 301(d), (f), (g).

The provision for temporary federal representation on the board of directors does not destroy the private character of the new corporation. Since Conrail will be a profit-making corporation established under the corporation statute of some state, all of its directors—including the federal appointees—will bear a fiduciary responsibility to Conrail's shareholders.[51] Moreover, the federal representation will exist only if Government obligations constitute more than one-half of Conrail's debt—an event which may not occur if Conrail issues debt securities to the rail estates as well as common stock. Even if it

[51] See 42 Op. Att'y Gen. No. 11, at 5-6 (1962) (Presidentially appointed directors of Communications Satellite Corporation have responsibilities of ordinary business directors).

should occur, the federal representation will cease as soon as the Government obligations are retired or their amount is exceeded by other debt issued by Conrail. Therefore, full control of Conrail's affairs will ultimately transfer to its shareholders through retirement or refinancing of the original debt or through additional borrowing.

Interim federal representation would be a reasonable measure to protect the interests of the United States, if, at the outset, it is a majority creditor of Conrail or guarantor of its debt. Should the provision for federal representation reduce the value of Conrail's securities in any way, the Special Court will be free to take that into account in assessing the fairness of the exchanges under the Final System Plan.

The New Haven Trustee likens Conrail to the Federal Deposit Insurance Corporation, Securities Investor Protection Corporation, and Amtrak, which he terms "nominally" private corporations engaged not in private enterprise but in "government enterprise."[52] In fact, a comparison of Conrail to those entities demonstrates how slight will be the federal presence in Conrail's management. The Federal Deposit Insurance Corporation and Securities Investor Protection Corporation are both federally chartered nonprofit organizations, whose boards of directors are permanently composed wholly of presidential appointees.[53] Amtrak is a federally subsidized entity created to relieve the private railroads of their chronically unprofitable passenger operations. Of the 17 members of its board of directors, ten must be presidential appointees, ensuring permanent federal control.[54]

[52] Brief of Cross-Appellant at 70.

[53] See 12 U.S.C. §§ 1811, 1812 (Federal Deposit Insurance Corporation); 15 U.S.C. § 78ccc (Securities Investor Protection Corporation).

[54] See 45 U.S.C. § 543.

It can scarcely be argued that Conrail's obligations to submit to federal audit and to prepare an annual report compromise its status as a private corporation. Conrail would face many similar requirements under federal securities laws and state laws in any event.

D. Penn Central's Investors Have No Present Constitutional Right To Terminate Service and Liquidate Its Rail Properties

The New Haven Trustee argues that Penn Central has a constitutional right to cease operations and liquidate its properties now. He construes the Rail Act as preventing him from exercising that right, and contends that the Act therefore deprives him of property without due process of law.[55] This asserted constitutional right to liquidate is also the underpinning of the "erosion taking" arguments of the Plaintiffs in these cases and of the New Haven Trustee's contention, answered below, that the "constitutional minimum" to which the estates will be entitled under the Final System Plan is present net liquidation value or more.[56]

We have already shown that the claimed present right to liquidate is based on a misapplication of this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920).[57] *Brooks-Scanlon* held only that railroad investors are entitled to liquidate when their rail operations are unprofitable and the railroad lacks any means, internal or external, of restoring them to a self-sustaining basis. The New Haven Trustee himself concedes that the *Brooks-Scanlon* rule applies only to a railroad which has "no reasonable present prospect" of

[55] Brief of Cross-Appellant at 84-87.

[56] See pp. 56-70 *infra*.

[57] See Brief of Appellant USRA at 82-84, 94-97.

producing income in excess of operating expenses.[58] Although Penn Central is incapable of an ordinary Section 77 reorganization, the "heroic"[59] exertion of Congress in the Rail Act creates a very reasonable prospect that vital Northeastern rail operations can be made profitable again. This Court's decisions from *Rock Island* through *New Haven Inclusion Cases* establish that continued operations may constitutionally be required for the period reasonably necessary to achieve reorganization under the Act.

The New Haven Trustee and the Penn Central Trustees purport to find contrary authority in the Third Circuit's recent opinion in the *Columbus Option Appeals*.[60] However, that case did not involve an asserted constitutional right to liquidate. The issue there was whether specific Penn Central properties could be sold, where the sales would reduce the amount of property securing senior liens and marshaling was not available. The court held that the sales were permissible only under conditions protecting junior lienholders.

The New Haven Trustee quotes a passage from *Columbus Option* which he claims demonstrates that *Brooks-Scanlon* was not overruled by *New Haven Inclusion Cases*.[61] We agree. *Brooks-Scanlon* and *New Haven Inclusion Cases* were addressed to different problems. *Brooks-Scanlon* determined the rights of investors in a railroad with no hope of future profitability. It did not

[58] Brief of Cross-Appellant at 84; Brief of Appellants Penn Central Trustees at 30, 36.

[59] *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166, Opinion and Order dated March 1, 1974, at 3 (Judicial Panel on Multidistrict Litigation).

[60] *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir.), petition for cert. filed, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672).

[61] Brief of Cross-Appellant at 84-85.

consider whether a railroad with prospects of successful reorganization may be kept running while efforts are made to realize those prospects. That question has repeatedly been answered in the affirmative, first in *Rock Island* and most recently in *New Haven Inclusion Cases*.

The *Columbus Option* opinion contains dicta which suggest that railroad creditors cannot be made to suffer any economic burden as a consequence of the effort to preserve rail operations. In the course of those dicta, the Third Circuit read the *Rock Island* case as turning on an assumption or finding that creditors were fully protected against loss from interim operations. As we have shown, that reading of *Rock Island* is simply mistaken.[62] Any implication in *Columbus Option* that the public's right to make reasonable efforts to preserve important rail operations on a self-sustaining basis depends on full compensation of railroad investors for any interim losses plainly conflicts with this Court's holdings in *Rock Island*, *Denver & Rio Grande*, *Penn-Central Merger Cases*, and *New Haven Inclusion Cases* and should be disregarded.

Moreover, the New Haven Trustee is wrong in asserting that the Rail Act prevents his exercising a constitutional right to liquidate if and when such a right matures. As we stated in our Brief as Appellant, if this Court holds that the Rail Act repeals the Tucker Act *pro tanto* and thus destroys the availability of an adequate remedy at law for any erosion beyond constitutional limits, Section 304(f) of the Act should then be read to permit USRA to require continued operations only where such operations are constitutionally permissible without compensation.[63] Such a reading of Section 304(f) would not strain the statutory language and

[62] See Brief of Appellant USRA at 85 n. 106.

[63] Brief of Appellant USRA at 64-66.

would enable this Court to hold that section constitutional even as applied to a hypothetical future situation in which the prospect of successful reorganization offered by the Rail Act does not materialize and Penn Central's plight becomes as hopeless as was the railroad's in *Brooks-Scanlon*.

E. The New Haven Trustee's Contentions About the "Constitutional Minimum" Are Premature and Erroneous

The New Haven Trustee seeks to have this Court, in deciding the facial validity of the Rail Act, determine the central issue which the Act assigns to the Special Court for decision on review of the Final System Plan: the measure of the "constitutional minimum" consideration to which the railroad estates are entitled in exchange for their rail properties. He further argues that the measure of that "constitutional minimum" is the "highest and best use value" of the properties, a value that he says is at least current net liquidation value and may be greater because Penn Central's properties are an "irreplacable national asset." [64] We submit that the New Haven Trustee is wrong in his assertion that this constitutional issue is ripe for decision and wrong in his suggested resolution of the issue.

As we have shown above, there is no reason why this Court need decide the fundamental valuation question before the Final System Plan is even prepared. The Rail Act does not in terms promise any particular measure of compensation, whether highest and best use value, net liquidation value, going-concern value, or any other. What it does promise, in Section 303(c), is that the

[64] Brief of Cross-Appellant at 61-68. The Penn Central Trustees do not press this Court to define the "constitutional minimum" as the New Haven Trustee does; nevertheless, they support the "highest and best use value" concept. Brief of Appellants Penn Central Trustees at 54-55 & n. 22.

consideration will equal the "constitutional minimum," as that minimum is determined by the Special Court on review of the Final System Plan and ultimately by this Court on review of the Special Court's decision. Section 303(c) makes it clear that an important element of the fairness and equity of the Final System Plan—the "constitutional minimum"—should not be decided in a vacuum. It is to be decided by the Special Court in light of the specific factual record developed in Section 303 proceedings. The Special Court will have available to it a panoply of remedies to redress any unfairness in the exchanges, and, as we have demonstrated elsewhere,[65] the Tucker Act is available to remedy any shortfall if the total value available to the Special Court proves constitutionally inadequate. Therefore, there is no reason for this Court to adjudicate now the New Haven Trustee's theories about valuation. As the court below held, and as we have argued above, strong considerations of judicial administration argue against premature decision of such an important constitutional issue.

If this Court nevertheless concludes that it should define the "constitutional minimum," we submit that it should reject the definition proposed by the New Haven Trustee. In the context of this case, there are at least four ways of determining the value of any rail properties which Penn Central may transfer to Conrail under the Final System Plan. First, the properties might be assigned their net liquidation value. That value would represent the highest amount that could be received through open market sales of the properties for non-rail use. The value estimated on that basis would, of course, have to be reduced by the expenses of liquidation and discounted to present value. Second, the properties could be valued according to their earning potential in their present railroad use. In the case of Penn Central, this

[65] See Brief of Appellant USRA at 40-60.

present going-concern value cannot be determined. Penn Central as a whole is suffering continuing operating losses, and the Penn Central Reorganization Court has held that the railroad is not capable of separate reorganization on an income basis within a reasonable time; but the parts of the system that will eventually be transferred to Conrail may have significant present going-concern value in the sense that they contribute favorably to Penn Central's operating results. Third, assuming that USRA is successful in designing a viable Conrail, the properties transferred to Conrail could be valued according to their contributions to its going-concern value. In view of the substantial resources made available by the Rail Act and the emphasis placed by that Act on producing a profitable system, Conrail's going-concern value may be substantial and the contribution of the transferred rail properties to that going-concern value may exceed the net liquidation value of the properties. Fourth, as noted below, the New Haven Trustee argues that because Penn Central's rail properties are an "irreplaceable national asset," they should be assigned a value greater than net liquidation value—possibly as much as the cost of reproducing them new, less depreciation.

Contrary to the New Haven Trustee's assertions, this Court's prior decisions do not establish what valuation theory is appropriate for review of a hypothetical Final System Plan. No case has held that investors universally have a constitutional right to liquidation value (or any other measure of value) in a reorganization. The issue was certainly not decided in *New Haven Inclusion Cases*, *supra*. All parties in that litigation, as well as the reorganiaztion court, proceeded on the premise that the price for the New Haven properties should be net liquidation value, because the New Haven had "long been dry of earning power." 399 U.S. at 436. As this Court explained, a liquidation price "hypothesizes a shutdown

of [the railroad] followed by a sell-off of its assets at their highest and best value." *Id.* at 489. Since the New Haven properties concededly had no going-concern value, either separately or as part of Penn Central, this Court agreed with the lower court that liquidation value was the "fair and equitable" price called for by Section 77. Therefore, the Court did not find it "necessary to consider the bondholders' claim that anything less than full liquidation value would amount to an uncompensated taking in violation of the Fifth Amendment." *Id.* at 490.[66] Although the New Haven lines were clearly an important national asset in the sense that the public interest would be greatly harmed if they ceased operation, this Court rejected the bondholders' argument that that fact entitled them to something more than liquidation value. *Id.* at 482-83 n. 80.

New Haven Inclusion Cases thus does not provide a rule to govern valuation under the Rail Act. Far from it, this Court's opinion shows not only that the applicable constitutional principles remain largely undetermined but also that the dictates of the Fifth Amendment may depend heavily on the specific facts and circumstances of an individual case. Even if this Court had held—which it did not—that liquidation value was the constitutional minimum for a railroad, such as the New Haven, that had no present or potential going-concern value, that holding would not dispose of the issue here. This Court should follow the precedent of *New Haven Inclusion Cases* in refusing to adjudicate the Fifth Amendment valuation issue where decision of that issue is unnecessary and

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[66] However, as we have noted, the Court awarded a liquidation value not as of the date when the New Haven became "dry of earning power" but as of a date several years later; and it further required the claimants to suffer uncompensated erosion for two years after the valuation date. See Brief of Appellant USRA at 87-93.

where the factual predicate for such a decision does not exist.

The Penn Central Reorganization Court in its 180-Day Decision held that Penn Central's investors are constitutionally entitled to liquidation value if that value exceeds going-concern value.[67] That court based its holding on the *Brooks-Scanlon* rule that a carrier with no reasonable expectation of future profits has a constitutional right to cease operations. The court reasoned that, since such a carrier would realize the net liquidation value of its properties when it went out of business, that value places a minimum on the value that a carrier may receive even in an income-based reorganization. As the court correctly observed, its rationale implies that investors in *any* railroad—even one which is profitable and has never entered bankruptcy—are entitled to liquidate and reinvest their money elsewhere whenever they can show that a higher return can be realized from some other use of their capital. In other words, the court rejected "the premise that the government can properly require [even profitable] railroads to operate indefinitely." [68]

The Penn Central Reorganization Court's reliance on *Brooks-Scanlon* reflects its failure to distinguish between the rights and duties of investors in a "hopelessly unprofitable" railroad, as outlined in that case, and those of investors in a carrier that is profitable or can be made profitable by reorganization. *Brooks-Scanlon* held only that a railroad with no future as a railroad must be allowed to liquidate and its properties put to other uses. It did not hold that a profitable franchised common carrier, or a carrier which can be reorganized to be profitable, must be allowed to liquidate merely be-

[67] *Penn Central* 180-Day Decision at 15-21, JA 124 at 140-46.

[68] *Penn Central* 180-Day Decision at 18, JA 124 at 143.

cause the net liquidation value of its rail properties—that is, their value based on their earning power in some other use—exceeds the railroad's going-concern value based on projected profits from rail operations. Nor has any other case ever so held. This Court has never held that, after investors dedicate their property to public use as a federally franchised carrier, they may rescind that dedication whenever liquidation and transfer of the funds to another enterprise look more profitable.

Both Section 77 and the Interstate Commerce Act embody the principle that a rail common carrier may be required, once it begins franchised service, to continue that service as long as the public convenience and necessity require, provided that the service can be furnished profitably. As noted above, the chief criterion of value in a successful Section 77 reorganization is future earning power. This Court's decisions upholding that method of valuation neither decided nor expressly assumed that going-concern value based on future earnings exceeded liquidation value.[69] Rather, stressing the public interest in continuation of rail service, they implicitly held that this public interest justifies requiring investors in a railroad to continue their investment as long as the rail operations are profitable.

The same principle is embodied in Section 1(18) of the Interstate Commerce Act, which forbids discontinuance or abandonment of rail operations "unless and until there shall first have been obtained from the [Interstate Commerce] Commission a certificate that the present or future public convenience and necessity permit of such

[69] We have examined the briefs and records in the leading cases in this Court under Section 77—*Rock Island*, *Ecker*, and *Denver & Rio Grande*, *supra*, and *Group of Institutional Investors* v. *Chicago, M., St. P. & P.R.R.*, 318 U.S. 523 (1943). In none of those cases was it proved, argued, or expressly assumed by any party that going-concern value exceeded liquidation value.

abandonment."[70] The validity of that provision is unquestioned. Yet the holding of the Penn Central Reorganization Court would imply that the ICC is constitutionally compelled to authorize abandonment whenever liquidation value exceeds going-concern value. On that view, a new constitutional issue would be injected into every ICC abandonment proceeding—that is, the issue whether a higher return could be made by diverting the capital once dedicated to public use to some other investment. The holding of the Penn Central Reorganization Court, if endorsed by this Court, would abolish the concept of a common carrier's duty to serve the public.

The Penn Central, unlike the New Haven and the railroad in *Brooks-Scanlon*, is on the verge of having at least some of its operations made profitable again by reorganization along with the other railroads in the region under the Rail Act. A viable Conrail with a substantial going-concern value is the primary statutory goal of the Act, and there is no basis now for an assumption that the machinery of the Act will fail in achieving that goal. The New Haven Trustee suggests that, since his proposed reorganization of Penn Central was found not to be viable, USRA will be unsuccessful in planning a profitable combined system.[71] However, a much firmer basis would be necessary to support a conclusion that the Rail Act will be unsuccessful. As a plaintiff seeking an injunction against implementation of a federal statute, the New Haven Trustee bore the burden of proving that the statute would violate his constitutional rights. The courts have held that the burden of proving that the continuation of a railroad reorganization would result in an unconstitutional taking of property rests on

[70] 49 U.S.C. § 1 (18).

[71] Brief of Cross-Appellant at 44.

the opponents of reorganization.[72] Since the New Haven Trustee's contention amounts to an assertion that Congress was wrong in determining that the Rail Act provides at least a reasonable prospect of accomplishing its major goal, the burden he bore was a heavy one. He has utterly failed to sustain that burden.[73]

The Penn Central Reorganization Court declined the New Haven Trustee's invitation to second-guess Congress' judgment that the resources of the Rail Act would be adequate to produce a viable Conrail. That court held:

> "I agree with the contention of the government that it would be both premature and inappropriate for this Court to express a judgment as to Conrail's prospects for viability.
>
> ". . . [I]t is obviously beyond the power of a district judge to substitute his own assessment of the feasi-

[72] *New Haven Inclusion Cases*, 399 U.S. 392, 492-93 (1970); *In re Boston and Maine Corp.*, 484 F.2d 369, 372-75 (1st Cir. 1973). There is nothing unconstitutional or even unusual in placing the burden of proof on those opposing the operation of a remedial statute, or in defining issues under the statute in a way that has the same practical result. See *United States* v. *First City National Bank*, 386 U.S. 361 369-70 (1967); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966); *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938).

[73] The New Haven Trustee asserts that "the responsibility for an inadequate record does not belong to the Penn Central claimants since Congress has ordered that an irrevocable decision to convey or not to convey Penn Central's rail assets to Conrail be made in advance of any valuation hearings." Brief of Cross-Appellant at 80 n. 75. The "irrevocable decision" to which he refers appears to be the 180-day decision under Section 207(b) whether Penn Central should continue in reorganization pursuant to the Rail Act. As we have demonstrated, an affirmative decision at that point is not "an irrevocable decision to convey . . . Penn Central's rail assets to Conrail." See p. 45 n. 43 *supra*. Since the New Haven Trustee was not required to bring an injunctive suit challenging the facial validity of the Act before the implementation of the Act had scarcely begun, he cannot escape responsibility for failing to produce a record that sustains his claims.

bility of a legislative program for that of Congress. Any such attempt would be squarely contrary to the concept of a tripartite form of government.

"The task of designing a financially viable rail system, and therefore of making at least the initial assessment of its viability, has been committed to USRA, and not to this Court. . . . The task of evaluating Conrail's stock and other securities has been committed to the Special Court, and is to be performed at a time when all concerned will have more of the necessary information than is now available. It is proper to assume that, if USRA finds it impossible to design a profitable system, it will say so. In any event, the validity of its viability assessment can be tested before the Special Court at the appropriate time." [74]

Thus, the Rail Act must be regarded as creating a reasonable prospect that Penn Central and the other railroads in reorganization will be successfully reorganized. It rescues them from the hopeless condition which is the premise of the *Brooks-Scanlon* rule. The Penn Central Reorganization Court was wrong in relying on *Brooks-Scanlon* to support a rule that transferring railroads must receive liquidation value for properties transferred under the Final System Plan even if those properties have substantial going-concern value as part of Conrail.

The New Haven Trustee suggests that the Penn Central estate may be entitled to an amount even greater than the net liquidation value of transferred properties, because Penn Central's properties are an "irreplaceable national asset." [75] That contention is difficult to take seriously. All parties concede that, apart from the resources made available by the Rail Act, Penn Central as a whole is unprofitable and cannot be made profit-

[74] *Penn Central* 180-Day Decision at 9-10, JA 124 at 133-34.

[75] Brief of Cross-Appellant at 63-65, 80, 82, 91.

able.[76] If Conrail achieves a going-concern value greater than the liquidation value of the properties included, the estates that contributed the properties are entitled to their proportionate share of that value. However, the New Haven Trustee would have the Court hold that, regardless of whether the properties are more valuable for rail or non-rail use, Conrail should be required to pay a price which exceeds the economic value of the properties for *any* use. The New Haven Trustee's reference to Penn Central as an "irreplaceable national asset" reveals his rationale for this contention: Because the public interest requires that vital rail operations be continued by one means or another, Penn Central's owners have an opportunity to exploit this public need by "holding up" Conrail or the Government for any amount up to what it would cost to build a complete substitute system.

The Penn Central Trustees support this approach to valuation, and they are more explicit about the rationale for it. They argue that the "constitutional minimum" must include value created "by a demand for reasons other than profitability, such as a public-interest need determining offers by public bodies." Brief of Appellants Penn Central Trustees at 54-55 n. 22.

The New Haven Trustee is reticent about what he believes is the general magnitude of Penn Central's "highest and best use value." However, he strongly implies that the approach used to develop the $13.5 billion figure stated in the Day & Zimmerman Report (J. Doc. 40) is the constitutionally required approach to valuation of Penn Central. Brief of Cross-Appellant at 63-67, 79-80. That figure is the result of a process aimed at determining the value of the Penn Central system if devoted to continued rail operations. The report valued physical assets (other than real estate and

[76] See *id.* at 67.

materials and supplies) on the basis of reproduction cost new as of December 31, 1970, less depreciation. Real estate, including parcels which may have been acquired a century or more ago, was valued at the estimated cost of acquiring it at fair market value as of December 31, 1970. J. Doc. 40 at 5-8.

Startling anomalies would result from adoption of the New Haven Trustee's "highest and best use value" approach, as can be seen from the Day & Zimmerman figures. Properties which together have no value as an operating system under private ownership would suddenly increase in value to $13.5 billion as an operating system if they were to be nationalized and operated publicly. Properties which may have a net liquidation value of not more than $1.9 billion would have the potential to increase in value overnight by more than 650% even though their physical condition did not change a bit. And Penn Central's shareholders, whose claims may actually have been wiped out long before the passage of the Rail Act, would suddenly find themselves holding a rich $13.5 billion bonanza against which valid pre-bankruptcy claims may total no more than $2.7 billion. *See* Brief of the United States of America, Appellant, in No. 74-168, at 71-72.

The New Haven Trustee turns to condemnation decisions to support his theory. However, federal condemnation decisions expressly reject the tactic that he is employing. In many condemnation contexts, the public need for the condemned property is so great that the taking authority would be willing, if necessary, to pay a greater price than any private purchaser would pay on the open market. In order to prevent owners from exploiting this public need, this Court has firmly established that the measure of compensation under the Fifth Amendment for property taken is the owner's loss —measured at private market values—and not the taker's

gain."[77] "It is not fair that the government be required to pay [an] enhanced price which its demand alone has created."[78] Where the highest commercial value of a property is as scrap, the public cannot justly be required to pay a greater amount to retain the property in a less lucrative public use. "Substantial prices are not paid for the privilege of conducting a business at a loss."[79]

The New Haven Trustee asks this Court to overturn this established axiom on the basis of two state court decisions. *In re New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E.2d 410, appeal dismissed sub. nom. *Fifth Avenue Coach Lines* v. *New York*, 386 U.S. 778 (1967); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, cert. denied sub. nom. *Port Authority Trans-Hudson Corp.* v. *Hudson Rapid Transit Tubes Corp.*, 390 U.S. 1002 (1968). Those decisions provide no basis for such a legal upheaval.

In the first place, although the opinions of the New York Court of Appeals in both cases mention the Federal Constitution and discuss some federal authorities, both decisions were based on the just compensation clause of the New York State Constitution and state decisions construing it.[80] Therefore, both decisions rested on an independent and adequate state ground which insulated them from review by this Court,[81] and they lack pre-

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[77] *E.g. Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910); *McGovern* v. *New York*, 229 U.S. 363, 371-72 (1913); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949); see 1 L. Orgel, Valuation Under the Law of Eminent Domain § 81, at 353 (2d ed. 1953).

[78] *United States* v. *Cors*, 337 U.S. 325, 333 (1949).

[79] *Roberts* v. *New York*, 295 U.S. 264, 282 (1935).

[80] See 219 N.E. 2d at 414-15; 231 N.E. 2d at 739-41; *Id.* at 742, 746-47 (Burke, J., dissenting).

[81] *See, e.g., Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

cedential value as interpretations of the Fifth Amendment.

Moreover, the *New York* decisions do not support the proposition for which the New Haven Trustee contends. In the *Fifth Avenue* case, New York City had condemned two private bus companies operating in the city which, though unprofitable under the rates prescribed by city authorities, would have been profitable if allowed to charge the reasonable rates to which they were entitled under state law. The New York court was required to decide whether the owners should receive only liquidation value, on the ground that their operations were presently unprofitable, or going-concern value based on the profits they would have been making under the rates to which they were legally entitled. The court held that they were entitled to going-concern value, reasoning that the city should not be permitted to take advantage of the diminishment in the companies' value which resulted from the city's *illegal* suppression of their rates. The decision did not depart from the principle that the owners' loss determines the measure of compensation, but merely included as part of the owners' loss the diminishment in value caused by the taker's previous illegal conduct.

In the *Hudson Rapid Tubes* case, the New York courts relied on *Fifth Avenue* to reach a result supported by neither the prior case nor any other authority. The case involved the condemnation by the New York Port Authority of a private transit company whose properties included four railway tunnels under the Hudson River between New York and New Jersey. The liquidation value of the tunnels was concededly negative, since they had no market value and it would cost money to plug them up. The tunnels had cost $32,000,000 to build and would have cost $400,000,000 to replace. The state court recognized that the owners would be entitled to no compensation for the tunnels under the established rule, because

they had no market value either for their present use or any other use. However, because the commuter line of which the tunnels were a part was "an essential public facility," which the Port Authority planned to operate at a loss in the public interest, the court concluded without explanation that the owners should receive the tunnels' depreciated original cost, or $30,000,000. In a forceful dissent, the author of the *Fifth Avenue* opinion noted the illogic of basing an award on original cost when the current market value did not reflect that cost.[82] As the dissenter observed, this Court had previously rejected the approach of the majority as a proper standard under the federal Constitution.[83] This Court has subseqeuntly refused to follow the *Hudson Rapid Tubes* decision in *New Haven Inclusion Cases*, where it rejected the argument that the New Haven estate should receive more than liquidation value because New Haven's rail properties would continue to be operated in the public interest rather than being scrapped.[84]

In short, this Court's prior decisions indicate that the "constitutional minimum" to which the transferring estates will be entitled under the Final System Plan may be their share of the going-concern value of Conrail, assuming that that value is substantial, or at most liquidation value, if greater. However, that question should not be answered in the abstract now but when the specific facts of the Final System Plan have been determined and the complexities of valuation under that Plan are before the Special Court. The New Haven Trustee has not shown that the facial constitutionality

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[82] 231 N.E. 2d at 742-43, 745 (Burke, J., dissenting).

[83] "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949).

[84] 399 U.S. at 481-83 & n. 80.

of the Rail Act depends on a choice of one or another valuation theory. Since only the Act's constitutionality is before this Court, it should not decide the valuation question at this time.

F. This Court's Function Is To Adjudicate the Constitutionality of the Rail Act, Not To Consider Whether Congress Might Improve It by Amendment

The New Haven Trustee has given the Court a detailed outline of the statute he wishes Congress had enacted instead of the existing Rail Act.[85] He invites this Court to rule that the statute Congress enacted is constitutionally defective and then to advise Congress on how to amend or replace it. However, that is not this Court's role.

Congress last year finally took a decisive step to resolve the Eastern rail crisis, after decades of public and private mismanagement. In the imaginative statute under review, it exercised its bankruptcy and commerce powers to devise a novel procedure, both administrative and judicial, for structuring a new private entity out of the several bankrupt North-Eastern railroads. To assist that process, it authorized over $2,000,000,000 of federal assistance, with an indication in the legislation that more may be authorized if it proves to be necessary.

Perhaps the most creative aspect of the Rail Act is its planning process, which breaks the interminable procedural log jam for devising and approving railroad reorganization plans that has plagued the ICC and the judiciary for decades under Section 77. The new planning process permits a rational and coordinated decision of which rail lines should continue in operation and permits prompt abandonment of lines not chosen for inclusion.

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[85] See Brief of Cross-Appellant at 88-92.

The central argument that is advanced against the process of the Act appears to be that the situations of the Northeast railroads have become so desperate that their rail operations can no longer be constitutionally saved by use of the commerce and bankruptcy powers. The only solution, the New Haven Trustee asserts, is outright nationalization and public ownership with all the higher costs and inefficiencies that public ownership implies.

Congress has made a sincere and "heroic" [86] attempt to resolve the Northeast rail problem without resorting to nationalization. The Rail Act represents its attempt to minimize the expense to the public treasury by exercising the bankruptcy power to require the bankrupt rail estates to continue devoting their properties to public service in exchange for the minimum consideration required by the Constitution when the bankruptcy power is so employed and an amount payable at least in substantial part in the securities of the reorganized entity rather than in cash.

The New Haven Trustee appears to recognize that the public interest requires continuation of vital rail services in the Northeast. However, he would prefer to have that accomplished by nationalization, a process he believes will constitutionally entitle him to compensation wholly in cash, and possibly in a much higher amount than obtainable in reorganization. If he can stymie Congress' effort to resolve the rail crisis now by providing the constitutional minimum in a bankruptcy context, he may be able to force Congress to take the course he prefers. However, he has no legal right to have this Court assist him in that endeavor.

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[86] *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166, Opinion and Order dated March 1, 1974, at 3 (Judicial Panel on Multidistrict Litigation).

The Rail Act resulted from an intensive period of congressional study and compromise. In its necessary complexity, it may not be a perfect statute or one that could not be improved by amendment. But it is the statute that Congress has enacted and the one that this Court must construe. It should be construed in a way that renders it constitutional if that is possible.

The transfer provisions of the Rail Act are an innovative response to a modern problem. Although novel, they involve no radical departure from previous bankruptcy legislation, and they comport with established Fifth Amendment principles applicable to such legislation. This Court should decline the New Haven Trustee's invitation to construe the transfer provisions in a way that creates, rather than avoids, constitutional problems, and to decide hypothetical constitutional issues before they arise. The New Haven Trustee has not shown that he is entitled to an injunction preventing the implementation of the Act.

III. THE RAIL ACT DOES NOT DEPRIVE THE NEW HAVEN TRUSTEE OF PROCEDURAL DUE PROCESS

Eight major railroads are now in reorganization. To solve this problem, Congress created machinery to devise and carry out a comprehensive program for restructuring rail operations to meet modern economic and competitive conditions. To permit timely implementation of the Final System Plan, Congress adopted a "two-step" approach similar to that used (and upheld by this Court [87]) in the inclusion of the New Haven's rail assets into the merged Penn Central: restructure the rail operations first, and conduct the inevitably protracted valuation proceedings afterwards. The New Haven Trustee's procedural-due-process objections to this approach amount to a contention that the present rail crisis simply cannot be resolved, at least without nationalizing Penn Central.

[87] *Penn-Central Merger Cases*, 389 U.S. 486 (1968).

A. Providing for a Vote and Judicial Review of Valuation Before Transfer Would Have Frustrated the Rail Act's Goals of a Prompt Restructuring of Multi-Corporate Operations

The New Haven Trustee asserts that two features of the Rail Act deprive him of procedural due process. First, the Rail Act does not give creditors of individual railroads a vote on whether to accept the Final System Plan. Second, the Rail Act does not provide for judicial review of the consideration received for transferred properties until after the transfers have occurred. These features of the Rail Act are, as the New Haven Trustee alleges, departures from the normal procedure under Section 77(e), where a plan of reorganization may be "crammed down" over objection but only after a vote and only after a judicial determination that the plan is fair and equitable and that its rejection by the creditors is not reasonably justified in the light of their rights and interests.

These departures from Section 77 procedures, however, are part of the very essence of the new congressional approach to a problem that Section 77 was inadequate to solve. Section 77 was designed to facilitate recapitalization of individual railroads whose operations were basically healthy. It does not provide any means of restructuring rail operations, much less of coordinating the restructure of the operations of several railroads. The long period of time involved in formulating, evaluating, voting upon, and adopting a Section 77 plan of reorganization is, if not desirable, at least inevitable and tolerable when what is needed is not a fundamental

change in rail services but the valuation of properties and the restructuring of capital. By contrast, the basic objective of the Rail Act in the interests of both the public and the estates and creditors of the individual railroads, is to redesign rail operations to make them self-sustaining. Congress determined, with good reason, that this simply cannot be done if each class of creditors of each rail estate must vote on the Final System Plan: the essence of the planning process is the ability to consider the available rail properties comprehensively, and the designation of the rail properties of a particular estate to be included in the Final System Plan depends upon the future use of rail properties of other railroads. Nor, for obvious reasons, should the implementation of the Plan await the outcome of the valuation process: the restructuring of rail operations that will make the system viable if implemented in 1975 may become inadequate if implementation is delayed to permit a valuation process after the Plan has been formulated.

The New Haven Trustee's "you-can't-get-there-from-here" approach to the rail crisis is not only unhelpful but unwarranted. The Penn Central estate and its creditors have an undoubted constitutional right (recognized explicitly in Section 303 of the Rail Act) to receive for rail properties the "constitutional minimum" consideration as determined by a federal court. The creditors do not, however, have a constitutional right to vote on the kind of rail service system the region needs or can support, or on the need to include Penn Central properties in the system. The decision not to include provision for such a vote does not, as already pointed out,[88] make the Rail Act a condemnation statute. For essentially the same reasons, transfer of rail properties without such a vote would not deny Plaintiff procedural due process.

[88] See pp. 40-50 *supra*.

Equally without merit is Plaintiff's principal procedural due process argument, namely that the estate or the creditors have a constitutional right to have rail properties valued in advance of transfer pursuant to the Final System Plan.

B. It Is Constitutionally Insignificant Whether the Determination of the Fairness and Equity of the Transfers Precedes or Follows Conveyance of the Properties

The Act provides that after the Final System Plan has been delivered to the Special Court, that Court shall promptly require the transfer of the properties designated for conveyance under the Plan. Section 303 (b). The Special Court is then required to determine whether the terms of the conveyances are fair and equitable to the estate of each railroad in reorganization. That determination is to be made "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act." Section 303(c)(1)(A). If the Special Court finds that the terms of one or more exchanges are not fair and equitable, it is authorized to reallocate the Conrail securities, order the provision by Conrail of other Conrail securities or USRA obligations, or enter a judgment against Conrail as necessary to cure the lack of fairness and equity. Section 303(c)(2).

The Special Court's review of fairness and equity will follow, rather than precede, the transfer of properties under the Plan.[89] This distinction has no constitutional

[89] Section 303(c) of the Act differs from Section 77 also in that the Special Court is to determine only whether the exchanges are fair and equitable "to the estate of each railroad in reorganization"; to ensure fairness to each class of claimants against each estate is not one of the Special Court's functions. See Section 77(e). However, the Conrail securities and other consideration received by

significance. Deferral of the determination of fairness and equity until after the conveyance of the properties does not prejudice the estates or claimants against those estates, since at the time of the conveyance there will be full assurance that adequate judicial remedies will be available to redress any lack of fairness or equity in the exchanges.

There is no constitutional rule that the terms of treatment of all creditors must be determined with finality before any portion of a reorganization plan is implemented. The reorganization of the New Haven estate by inclusion in the Penn Central system provides a close precedent for the multi-step reorganization process established by the Rail Act. After deciding that the New Haven railroad should be included in the Penn Central system, the ICC developed a two-step reorganization plan under which it would first determine the total compensation to be paid to the New Haven estate and, after certifying that aspect of the plan to the reorganization court, would proceed to determine how the compensation should be distributed among the claimants against the estate. The Commission certified the first step of the plan to the reorganization court, and its terms were ultimately approved, with modifications, by this Court on review of decisions of the reorganization court and a three-judge district court which reviewed the merger under Section 5 of the Interstate Commerce Act. See *New Haven Inclusion Cases*, *supra*. Meanwhile, *before* the total compensation due to the New Haven estate had been finally determined, the reorganization court ruled that the New Haven should transfer all of

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each estate under the Act will be subject to distribution among the claimants against that estate as determined by the several Reorganization Courts. Fair and equitable treatment of each class of claimants will therefore be assured in the individual reorganization proceedings just as it would be in a traditional Section 77 reorganization.

its assets to Penn Central by January 1, 1969, "*leaving the price and the other terms of the inclusion to be determined later.*" [90] In accordance with the court's ruling, the ICC ordered Penn Central to take over the New Haven's operations on the date specified.

When this Court upheld step I of the New Haven reorganization plan, with modifications, it did not suggest that the transfer of the properties before the final determination of the total price and before the determination of the distributive aspects of the plan was a departure from proper procedure in a Section 77 reorganization. It approved the features of the plan which provided for payment primarily in Penn Central securities and for evaluation of those securities on the basis of projected future earnings.[91] The Court observed that the early transfer of the New Haven's properties actually benefited the estate by ending the period in which the estate was required to bear the operating losses—a benefit which will also accrue to the estates of railroads such as the Penn Central from the provisions of the Rail Act requiring an early conveyance of properties to Conrail. 399 U.S. 415-16, 490-91. See also *In re New York, N.H. & H.R.R.*, 378 F.2d 635, 637 (2d Cir. 1967).

Key to the approval of the two-step approach of the ICC in the *New Haven* case was the existence of grounds for assurance that the New Haven estate would ultimately

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[90] *In re New York, N.H. & H.R.R.*, 289 F. Supp. 451, 458-59 (D. Conn. 1968) (emphasis added).

[91] This Court further approved an underwriting plan devised by the reorganization court, which called for additional compensation if the Penn Central stock failed to reach the value assigned to it under the plan within ten years. However, in view of the filing of a Section 77 reorganization petition by the Penn Central one week before the Supreme Court's decision was announced, the Court remanded the case for additional proceedings before the ICC and the reorganization court to devise modified payment arrangements. 399 U.S. at 488-89.

receive fair and equitable treatment as determined by the courts. Those grounds for assurance were thought to be provided by the Penn Central's commitment to pay the amount ultimately determined by the Commission and the courts to be fair and equitable. See 399 U.S. at 409-10, 412-13. Here, the fairness and equity of the transfers is to be reviewed by the Special Court and on appeal by this Court. Congress' waiver of sovereign immunity in the Tucker Act provides a forum for the debtor railroads to assert any claim they may have, after the Special Court proceedings are completed, that their property has been transferred for less than the "constitutional minimum" to which they are expressly entitled. They have no constitutional claim to more than that.

There is no question that the procedural due process requirements of the Fifth Amendment apply to the Rail Act. But due process depends on the particular circumstances presented. Whether a hearing is required and, if so, what kind of hearing and when it must be afforded are questions whose answers depend on the particular case. See *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). If a hearing is required, the "formality and procedural requisites . . . can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971) (footnote omitted). As expressed in a recent due process decision by this Court

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). Due Process of law guarantees 'no particular form of procedure; it protects substantial rights.' *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 351 (1938)." *Mitchell* v. *W. T. Grant Co.*, 42 U.S.L.W. 4671, 4674 (May 13, 1974) (White, J.).

See also *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513, 4519 (April 16, 1974) (Rehnquist, J.).

Due process requires that a hearing be held "at a meaningful time and in a meaningful manner," but content must be given to that general principle in a particular case by balancing the Government's interests against those of the person or persons affected. *Arnett* v. *Kennedy*, *supra*, 42 U.S.L.W. at 4524 (Marshall, J., dissenting); see *Mitchell* v. *W.T. Grant Co.*, *supra*, 42 U.S.L.W. at 4679 (Powell, J., concurring). In this case, the hearings on valuation questions that will be provided in the Special Court and, if necessary, the Court of Claims, will fully protect the estates and claimants while permitting the vital task of restructuring rail operations to proceed without lengthy delay.

In short, neither a vote nor pre-transfer judicial review is necessary to assure the New Haven Trustee all that he may constitutionally claim. A vote and pre-transfer judicial review would, however, make it impossible to solve the rail crisis on any basis other than nationalization, the result which the New Haven Trustee is clearly seeking.[92]

IV. THE RAIL ACT IS NOT VOID FOR WANT OF UNIFORMITY

The New Haven Trustee has renewed here his contention, essentially rejected by the Court below,[93] that the

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[92] Brief of Cross Appellant at 88-92.

[93] USRA has not appealed from the decision below holding the dismissal requirement in the third sentence of Section 207(b) void for want of uniformity. That limited holding has no material effect on the implementation of the Rail Act.

Rail Act is unconstitutional on its face because it exceeds Congress' power to enact "uniform Laws on the subject of Bankruptcies." The most striking thing about this contention is that it is wholly academic. The Rail Act in fact operates uniformly with respect to bankrupt railroads and their creditors throughout the United States, and the New Haven Trustee's objection—if it had any merit at all—could be met by deleting the word "regional" from the title of the legislation and a few places in the text without changing the operation of the statute in any material way.

The Rail Act applies, uniformly, to every operating railroad in reorganization in the United States. Congress was aware and this Court can take judicial notice of the fact that every operating railroad in reorganization on the date of enactment and today is in fact located in the region defined by the Rail Act.[94] The Rail Act also applies uniformly to every creditor of any particular railroad, wherever that creditor may be situated. Thus, the words "regional" and "region" could be stricken every place they appear in the Rail Act without changing the rights of any debtor or creditor. The only effects of these words are to give statutory focus to the needs of the region in USRA's rail planning process, and to prohibit profitable railroads outside the region from acquiring rail properties pursuant to the Final System Plan. Neither of these effects has anything to do with the rights of any debtor or creditor.

The New Haven Trustee's response to this point is, in essence, that Congress was just lucky this time and

[94] Section 77(a) requires any railroad filing a Section 77 petition to file a copy of the petition with the ICC, where it is reflected on that agency's Finance Docket. The Finance Dockets show that every operating railroad in reorganization in 1974 in the United States (including both Class I and Class II railroads) is located in the region. The only railroad in reorganization outside the region is a Class II railroad which ceased all operations in 1968 and sold substantially all of its lines in 1969.

should not be permitted to get away with a statute whose uniform operation is only an accident. If there *were* one small operating railroad in reorganization outside the region, then (according to his argument) Congress would be powerless to conclude that eight major interconnecting and competing railroads in reorganization in a single region present a special regional problem calling for comprehensive solution based on the needs and resources of the region. The words "uniform laws," which have never been successfully invoked to strike down a public law,[95] suddenly present an awesome (though purposeless) roadblock to the efforts of Congress to provide for the needs of the nation's commerce.

Even on a technical level, however, the contention of the New Haven Trustee is without merit. It is clear that even when it is acting under the bankruptcy power Congress can take account of the real differences that exist between different parts of the country. National bankruptcy legislation may accommodate itself to diverse state laws relating to such matters as dower, exemptions, validity of mortgages, priorities, and foreclosure proceedings. *Stellwagen* v. *Clum*, 245 U.S. 605 (1918); *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 189-90 (1902). More importantly, a bankruptcy statute may explicitly provide that the statute is not to be applied throughout its life in each locality of the country. It may constitutionally authorize the bankruptcy court to decide whether the statute should continue to be applied within the geographic area over which the bankruptcy court exercises jurisdiction. Such a provision in the amended Frazier-Lemke Act was held to meet the uni-

[95] What appears to have been the only holding adverse to constitutionality, that of the Court of Appeals for the Eighth Circuit in *United States National Bank* v. *Pamp*, 83 F.2d 493 (1936), striking down the Frazier-Lemke Act on uniformity grounds, was explicitly rejected by this Court in the *Vinton Branch* case discussed below in the text.

formity requirement in *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463 n. 7 (1937), where this Court stated:

> "This provision [permitting bankruptcy courts to determine whether the Act should continue to apply in particular localities] is not inconsistent with the constitutional requirement that laws established by Congress on the subject of bankruptcies shall be uniform throughout the United States. The problem dealt with may present significant variations in different parts of the country. By paragraph 6 the Bankruptcy Act adjusts its operation to these variations, as under other provisions it has adjusted its operation to the differing laws of the several States affecting dower, exemptions, and other property rights. The authority granted by paragraph 6 does not exceed limits of authority familiarly exercised by courts." [Citations omitted.]

The reorganization provisions of the Rail Act are consistent with the principles of uniformity set forth above. In enacting this legislation Congress has not purposefully discriminated against particular States. It has instead applied the Act to every locality in the United States where the condition of multiple major railroad reorzanizations exists.

The Bankruptcy Clause, insofar as uniformity is concerned, is similar to the clause giving Congress the power to lay and collect taxes, duties, imports, and excises (Article I, Section 8, Clause 1), which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." The courts have repeatedly held that the uniformity required by this clause is satisfied when the same class of items is taxed at the same rate wherever such items are found throughout the United States. For example, in the *Head Money Cases*, 112 U.S. 580 (1884), where a tax on shipowners for each passenger

landed from a foreign port was upheld even though its operational impact was confined to the Port of New York, the Court stated:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case . . . is uniform and operates precisely alike in every port of the United States where such passengers can be landed." 112 U.S. at 594.

See also *Knowlton* v. *Moore*, 178 U.S. 41 (1900); *Nicol* v. *Ames*, 173 U.S. 509, 521 (1899).

Nor does the uniformity requirement preclude incidental, nonuniform operation of otherwise proper statutes. In interpreting the "port-preference" clause (Article I, Section 9, Clause 6), which prohibits any regulation that gives "Preference . . . to the Ports of one State over those of another," this Court has required only that Congress not enact legislation which purposefully and directly discriminates against particular ports. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 79-80 (1908). Congress is still free to benefit particular ports by legislating improvements in commerce such as bridges, lighthouses, and roads even though the impact of such legislation results in a preference for the ports of one state over those of another. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); see also *Louisiana Public Service Commission* v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

The Rail Act can also be upheld against the "uniformity" challenge on the theory selected by the majority of the court below. The words "uniform laws" are not a special "Equal Protection Clause" for bankrupts. They merely limit the power delegated to Congress in the Bankruptcy Clause; they do not limit Congress' powers under the Commerce Clause and Article III, neither of which contains any requirement of uniformity.

The railroads affected by the Rail Act were already in reorganization when the Act was passed. The hands of their creditors had already been stayed by orders of the Reorganization Courts, which have not been disturbed by the Rail Act. The Rail Act (like much of Section 77 and like the ICC's use of powers derived from the Commerce Clause to require the bankrupt New Haven to be included in the merged Penn Central) is an effort based on the Commerce Clause to provide a solution to a problem affecting commerce. Commerce Clause legislation is not required to be uniform, *e.g.*, *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950), and is not invalid merely because it incidentally affects bankrupts in a nonuniform manner. *Cf. Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908). The authority to create USRA, to direct it to formulate a Final System Plan, to provide for the creation of Conrail, and to provide financial assistance to Conrail and other railroads clearly falls within the commerce power. The transfer of some existing bankruptcy powers to the Special Court is within Congress' power to define the jurisdiction of the lower federal courts, and no more violates "uniformity" than do the geographical venue provisions throughout the Bankruptcy Act. The power of a Reorganization Court to order transfers of property free and clear of liens already exists in Section 77, and such procedural changes as are effected by the Rail Act are clearly necessary and proper to the essentially commercial objective of providing an adequate and self-sustaining rail service system in the Northeast/Midwest Region.

CONCLUSION

For the reasons stated in this Brief and in our Brief as Appellant, it is respectfully submitted that the judgment of the court below should be reversed, except as to paragraphs 3 and 4c, and that the court below should be directed to enter an order granting Defendants' motions for summary judgment.

Respectfully submitted,

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